***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 77-7168

B

In The

## United States Court of Appeals

For The Second Circuit

TEACHERS UNITED FOR FAIR TREATMENT, KENNETH BOBROWSKY, BLOSSOM FOGEL, HARRIET GREENBAUM, LaFRANCES HILLS, ALICE LUBITCH, MARY McAULAY, JOSEPH McCRUM, MAURICE MENDOZA and PAMELA MARLAND,

*Appellants,*

-against-

IRVING ANKER, Chancellor of the Board of Education of the City of New York; ISAIAH ROBINSON, President of the Board of Education of the City of New York; and JAMES F. REGAN, a Member of the Board of Education of the City of New York,

*Appellees.*

UNITED STATES COURT OF APPEALS
FILED
SEP 6 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

*Appeal from the United States District Court of the Eastern District of New York.*

## APPELLANTS' APPENDIX ON APPEAL

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## TABLE OF CONTENTS


Page

Docket Entries ..... ..... A-1

Notice of Appeal ..... A-4

Memorandum and Order of Hon. George C. Pratt A-5

Complaint ..... A-31

Answer ..... A-60

Defendants' Notice of Motion to Dismiss .... A-70

Affidavit of Barry Asen in Support of Defendants' Motion to Dismiss ..... A-71

Affidavit of Naomi de Sola Pool in Support Defendants' Motion to Dismiss ..... A-73

Defendants' Statement Pursuant to Rule 9(g) As to Claims of:

- Plaintiff Teachers United for Fair Treatment ..... A-76
- Plaintiff Kenneth Bobrowsky ..... A-77
- Plaintiff La Frances Hills ..... A-79
- Plaintiff Pamela Marland ..... A-83
- Plaintiff Maurice Mendoza ..... A-85
- Plaintiff Harriet Greenbaum ..... A-86
- Plaintiff Alice Lubitch ..... A-88
- Plaintiff Joseph McCrum ..... A-92
- Plaintiff Blossom Fogel ..... A-95

Attorney's Affidavit in Opposition to Motion to Dismiss ..... ..... A-99

Plaintiffs' Statement of Material Facts As to Which They Claim There Exists A Genuine Issue to be Tried..... A-102

# DOCKET ENTRIES

| DIST/OFFICE | DOCKET YR. | DOCKET NUMBER | FILING DATE MO. | DAY | YEAR | J | N/S | O | R | R 23 | DEMAND | OTHER | JUDGE NUMBER | JURY DEM. | DOCKET YR. | DOCKET NUMBER |
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PLAINTIFFS | DEFENDANTS

TEACHERS UNITED FOR FAIR TREATMENT, et al | ANKER, IRVING, et al

TEACHERS UNITED FOR FAIR TREATMENT, KENNETH BOBROWSKY, BLOSSOM FOGEL, HARRIET GREENBAUM, LaFRANCES HILLS, ALICE LUBITCH, MARY McAULAY, JOSEPH McCRUM, MAURICE MENDOZA, and PAMELA MARLAND

IRVING ANKER, Chancellor of the Board of Education of the City of New York; ISAIAH ROBINSON, Presid of the Board of Education of the City of New York; and JAMES F. REGAN, a Member of the Board of Education of the City of New York

**CAUSE**

28 USC Secs. 1331, 1346 and 2201; 42 USC Sec. 1983. Plntffs seek a judgment invalidating and enjoining defts from enforcing Secs. 2590-j and 2568 of N.Y. State Education Law and Sec. 105 and 105(a) of By-Laws of Board of Education of City of New York

**ATTORNEYS**

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## DOCKET ENTRIES

76 C 283 TEACHERS UNITED FOR FOR FAIR TREATMENT vs. IRVING ANKER

| Date | PROCEEDINGS | |
|---|---|---|
| 2-11-76 | Complaint filed, Summons issued. | (1) |
| 2-25-76 | Summons ret. and filed/ executed. | (2) |
| 3-24-76 | By PLATT, J. - Order dtd 3-24-76 extending time to answer the complaint to 4-1-76 filed. | (3) |
| 4-1-76 | ANSWER filed. | (4) |
| 5-23-76 | Before PRATT, J. - Case called for OSC and adjd to 7-9-76. | |
| 6-24-76 | Pltff's request to produce filed. | (5) |
| 6-24-76 | Pltff's request for admission filed. | (6) |
| 6-24-76 | Notice to take deposition of defts filed. | (7) |
| 7-8-76 | By PRATT, J. - ORDER TO SHOW CAUSE ret 7-9-76 for an order re deft's depositions filed. | (8) |
| 7-8-76 | Deft's memorandum of law filed. | (9) |
| 7-09-76 | Before PRATT, J. - Case called. Adj'd to 7-30-76 for summary judgment. | |
| 7-14-76 | Pltff's notice filed. | (10) |
| 7-29-76 | Notice of motion ret. 9-17-76 with memo of law to dismiss and statement pursuant to rule 9 as to claims of United Teacher, Bobrowsky, Hills, Marland, McAulay, Mendoza, Greenbaum, Lubitch, McCrum, and Fogel filed. | (11 thru 22) |
| 8-17-76 | By PRATT, J. - Order dated 8-16-76 adjourned defendants motion for summary judgment to 10-1-76 filed. | (23) |

DOCKET ENTRIES

| Date | PROCEEDINGS | |
|---|---|---|
| 10-21-76 | Plaintiff's statement of material facts, etc. filed. | (24) |
| 10-21-76 | Attorney's affidavit in opposition to motion to dismiss filed. | (25) |
| 10-21-76 | Memorandum in opposition to defendant's motion for summary judgment etc. filed. | (26) |
| 10-29-76 | Before PRATT, J. - Case called for civil motion. Motion argued and decision reserved. | |
| 3-10-77 | By PRATT, J. - Memo and order dated 3-8-77 granting defendants' motion for summary judgment and dismissing the complaint filed. Copies mailed. | (27) |
| 3-10-77 | Judgment that the plaintiffs take nothing of the defendants and that the defendants motion for summary judgment is granted and the complaint is dismissed filed. | (28) |
| 4-8-77 | Plaintiffs' notice of appeal filed. Copy to Court of Appeals. | (29) |
| 4-22-77 | Scheduling order from Court of Appeals that record on appeal be filed on 5/2/77, filed. | (30) |
| 5-12-77 | Civil appeal scheduling order filed. | (31) |
| 6-15-77 | Civil appeal scheduling order #3 filed. (6-23-77) | (32) |
| 7-12-77 | Affidavit of Joan Goldberg in opposition to defendants' motion for a protective order filed. | (33) |

# NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

TEACHERS UNITED FOR FAIR TREATMENT, KENNETH BOBROWSKY, BLOSSOM FOGEL, HARRIET GREENBAUM, LaFRANCES HILLS, ALICE LUBITCH, MARY McAULAY, JOSEPH McCRUM, MAURICE MENDOZA and PAMELA MARLAND,

Plaintiffs,

-against-

IRVING ANKER, Chancellor of the Board of Education of the City of New York; ISAIAH ROBINSON, President of the Board of Education of the City of New York; and JAMES F. REGAN, a Member of the Board of Education of the City of New York,

Defendants.

----------x

NOTICE OF APPEAL

76 C 283

PLEASE TAKE NOTICE that the plaintiffs hereby appeal to the United States Court of Appeals for the Second Circuit from the Memorandum and Order of Hon. George C. Pratt, dated March 8, 1977, dismissing the complaint herein and granting defendants' summary judgment.

Dated: New York, New York
April 5, 1977

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TO: W. BERNARD RICHLAND
Corporation Counsel of the
City of New York
Municipal Building
New York, New York 10007

## MEMORANDUM AND ORDER OF HON. GEORGE C. PRATT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - x

TEACHERS UNITED FOR FAIR TREATMENT, KENNETH BOBROWSKY, BLOSSOM FOGEL, HARRIET GREENBAUM, LaFRANCES HILLS, ALICE LUBITCH, MARY McAULAY, JOSEPH McCRUM, MAURICE MENDOZA, and PAMELA MARLAND,

DOCKET NO. 76 C 283

Plaintiffs,

MEMORANDUM AND ORDER

- against -

IRVING ANKER, Chancellor of the Board of Education of the City of New York; ISAIAH ROBINSON, President of the Board of Education of the City of New York; and JAMES F. REGAN, A Member of the Board of Education of the City of New York,

Defendants.

- - - - - - - - - - - - - - - - - - - - - x

PRATT, J:

Plaintiffs Teachers United for Fair Treatment (TUFT), an organization of approximately 125 members, and nine individually named teachers brought this action to enjoin enforcement of certain sections of the Education Law of the State of New York and certain procedures promulgated thereunder by the defendants, on the grounds that they are unconstitutional either on their face or as applied, and to obtain damages for injuries suffered by the plaintiffs for violation of their individual rights as a result of these statutes and

procedures. For the reasons discussed below, defendants' motion for summary judgment argued October 29, 1976 is granted.

I

Since TUFT lacks standing to maintain this lawsuit, summary judgment should be entered against this plaintiff. As the Supreme Court has recently noted:

> In Warth v. Seldin, 422 U.S. 490 (1975) * * * we reviewed the constitutional limitations and prudential considerations that guide a court in determining a party's standing * * *. The essence of the standing question, in its constitutional dimension, "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Id., at 498-99, 95 S.Ct. at 2205, quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The plaintiff must show that he himself is injured by the challenged action of the defendant.
>
> Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 SCt 555,561 (1977).

In the instant case, plaintiff TUFT has failed to establish that, as an organization, it has suffered a judicially cognizable injury sufficient to confer standing.

Assuming arguendo that each of the nine indivi-

dual plaintiffs, members of TUFT, have judicially cognizable claims, they are clearly capable of asserting their own diverse claims and have in fact done so. There is no indication that other members of TUFT are incapable of asserting any of their own claims. Moreover, these individuals could not have their separate claims adjudicated without participating as plaintiffs in a lawsuit. Compare NAACP v. Button, 371 US 415 (1963), with Warth v. Seldin, 422 US 490 (1975) and Independent Investor Protection League v. Saunders, 64 FRD 564 (ED Pa 1974). In sum, when the nature of the claims and of the relief sought make the individual participation of each injured party indispensible to the proper resolution of the case, and when the association advances no separately cognizable claim on its own behalf, an association may not properly represent each of the separate and distinct interests. Warth v. Seldin, supra, 422 US at 511, 516-17.

II

Plaintiff Kenneth Bobrowsky, a tenured teacher at Bronx High School of Science, seeks redress for the receipt of an "unsatisfactory" rating from his principal in 1973. Alleging a deprivation of his liberty and property interests and relying upon Board of Regents v. Roth, 408 US 564 (1972),

Bobrowsky claims that the administrative review conducted under section 105a of the By-Laws of the Board of Education of the City of New York (By-Laws) which sustained the "unsatisfactory" rating failed to comport with certain due process requirements, including representation by counsel and an evidentiary hearing.

While recognizing that liberty and property constitute protected interests, Board of Regents v. Roth, supra, also recognized that "the range of interests protected by due process is not infinite." Id. at 570. And, in commenting upon Roth and its companion case Perry v. Sindermann, 408 US 593 (1972), the Second Circuit has observed that:

> These cases teach that when either a deprivation of a property interest such as in a permanent job, or a deprivation of liberty, such as a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee.
>
> Velger v. Cawley, 525 F2d 334, 336 (CA2 1975), rev'd on other grounds sub nom. Codd v. Velger, 45 USLW 4175 (US Feb. 22, 1977) (emphasis added).

Accord, Bishop v. Wood, 96 SCt 2074 (1976); Paul v. Davis, 96 SCt 1155 (1976). Simply put, absent termination of that employment, an "interest" in employment does not rise to the level of a property or liberty right constitutionally protec-

ted by procedural due process.

Plaintiff here had no claim of entitlement to a "satisfactory" rating; nor was he discharged for receipt of an "unsatisfactory" rating. Moreover, New York's CPLR §7801 afforded plaintiff recourse from an arbitrary and administrative determination sustaining the rating. Since "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, "Bishop v. Wood, supra, 96 SCt at 2080, and the actions taken by the defendants in sustaining the "unsatisfactory" rating do not involve any protected constitutional rights, summary judgment should be entered against plaintiff Kenneth Bobrowsky.

III

In October 1972 charges were preferred against plaintiff Blossom Fogel and her removal was sought for conduct unbecoming her position and conduct prejudicial to the good order, efficiency, and discipline of the service. Soon thereafter the charges were amplified by numerous specifications. After a hearing conducted pursuant to By-Law §105, the trial examiner dismissed certain charges, found her guilty of

others, and recommended dismissal. On June 28, 1973 the Board of Education (board) concurred in these findings, but modified the recommendation to permit plaintiff the option of resigning to secure any accrued pension rights -- an option which she refused.

On November 12, 1973, plaintiff Fogel commenced a proceeding in the state courts seeking to overturn her dismissal on evidentiary and constitutional grounds. Specifically, plaintiff briefed and argued that the hearing procedure denied her due process of law in that she was given improper notice of the charges, was refused a copy of the trial examiner's report, and denied an opportunity to comment thereupon. By decision rendered June 30, 1975, the Appellate Division, Second Department, remanded the matter to the board stating:

> Under the circumstances of this case, petitioner, having requested to see the Trial Examiner's report prior to a decision by the respondent, should have been given the opportunity to controvert the findings which are the subject of review. (Matter of Sorrentino v. State Liq. Auth., 10 NY2d 193). We have considered the other contentions raised by petitioner and find them to be without merit.
>
> In re Fogel v. Board of Educ., No. 872E/1141 (June 30, 1975).

The board subsequently made the report available to the plaintiff who then submitted a written response and, with counsel, addressed the board on January 21, 1976. Nonetheless, on that same day, the board adopted a resolution reaffirming the original decision to dismiss the plaintiff. On March 4, 1976, plaintiff initiated an appeal before the New York State Commissioner of Education, who, on February 25, 1977, sustained the board's resolution and dismissed the appeal.

In the instant case, plaintiff Fogel once again challenges the constitutionality of the board's hearing procedures in that they failed to give adequate notice of the charges and failed to authorize the teacher to receive and respond to the findings of the trial examiner. Not only is the latter claim moot, but the former is barred by the res judicata effect of the Appellate Division decision. See Thistlewaite v. City of New York, 497 F2d 339 (CA2 1974), cert. de ied, 95 SCt 686 (1975); Taylor v. New York City Transit Authority, 433 F2d 665 (CA2 1970). Neither Lombard v. Board of Educ., 502 F2d 621 (CA2 1974), cert. denied, 95 SCt 1400 (1975) nor Newman v. Board of Educ., 508 F2d 277 (CA2), cert. denied, 95 SCt 1447 (1975), can be profitably cited to the contrary where, as here, the constitutional claims were

clearly and specifically raised, elaborated upon, and decided in the state court proceedings. To hold otherwise would be to give this plaintiff "two bites at the cherry." Lombard v. Board of Educ., supra, 502 F2d at 636. See also VIII, infra.

Accordingly, summary judgment should be entered against plaintiff Blossom Fogel.

IV

Plaintiff Harriet Greenbaum, a tenured teacher of library at Erasmus High School, was suspended with pay on the basis of charges preferred against her. Plaintiff concedes that a hearing on these charges, as amplified by the specifications, is now in progress and that the board has not to date made a final determination in the matter. Since the due process protections afforded a disciplined teacher by the board's hearing procedures are not unconstitutional on their face; see VIII, infra, and a court will not, in the absence of unusual circumstances, not present here, interfere with a pending administrative matter in which there has been no final determination, Safir v. Gibson, 392 F2d 137 (CA2), cert. denied, 400 US 850 (1970), plaintiff Greenbaum has failed to state a claim upon which relief may be granted.

Nor can plaintiff's claimed deprivation of a liberty interest resulting from an "unsatisfactory" rating in 1973 be sustained. The rating was subsequently reversed by the State Commissioner of Education on procedural grounds; any conceivable stigma resulting from the rating did not arise in the context of termination of employment; and, if this 1973 rating forms the basis for any part of the charges now pending before the board, redress is available at the hearing. In sum, plaintiff has not been deprived of a liberty interest without due process of law. See Board of Regents v. Roth, supra; Bishop v. Wood, supra; Codd v. Velger, 45 USLW 4175 (US Feb. 22, 1977); II, supra.

Accordingly, defendants' motion for summary judgment addressed to the complaint of plaintiff Harriet Greenbaum is granted.

V

Plaintiff LaFrances Hills, a probationary teacher serving in Brooklyn's P.S. 21, was requested by her principal on May 30, 1972 to undergo a medical examination at the Medical Bureau of the Board of Education pursuant to New York Education Law §2568. On June 9, 1972 plaintiff was examined by

two physicians of the board who referred plaintiff for a panel psychiatric examination. After cancelling a June appointment, plaintiff met with a panel psychiatrist on August 9, 1972. As a result of these medical and psychiatric examinations, plaintiff was found unfit for teaching duties and placed on involuntary medical leave commencing September 1972 until February 1, 1973.

Pursuant to the then-existing collective bargaining agreement between the Board of Education and the plaintiff's union, on September 29, 1972 Ms. Hills requested an evaluation by an "ad hoc committee" of physicians, consisting of one physician selected by Ms. Hills, one by the board, and a third selected by the other two physicians. After two letters from the board requesting that plaintiff supply the name of her physician, on October 24, 1972 plaintiff, by her attorney, again requested formation of an ad hoc committee and provided the name of a physician. On that same day, however, plaintiff informed the board that she was medically unfit to appear before the ad hoc committee (not as yet formed) and requested additional time. Defendants' Rule 9(g) Statement re: Plaintiff LaFrances Hills, Exhibit G.

No further action was taken until May 1, 1973

when plaintiff appeared at the board's Medical Bureau and declared that she wanted to resume teaching. Plaintiff was again examined by the board's physician on May 9, 1973 and again referred to a panel psychiatrist, but plaintiff repeatedly cancelled the scheduled appointments. Plaintiff's leave of absence for health reasons was continued to February 1, 1974; and, after two more examinations held five months apart, the health leave was extended to June 30, 1975. Plaintiff never requested further examinations or further board action after this date.

Plaintiff alleges that she has been denied her liberty interest in employment without due process of law since she was stigmatized by the determination that she was declared medically unfit to continue teaching. Plaintiff's bare allegation, however, fails to state a claim for which relief can be granted.

As the Supreme Court has recently explained:

> [T]he hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely "to provide the person an opportunity to clear his name." * * * Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with

his termination is such a hearing required. Roth, supra; Bishop, supra.

Codd v. Velger, 45 USLW 4175, 4176 (US Feb. 22, 1977).

In the instant case, since plaintiff was neither terminated from her employment nor denied reinstatement when found medically fit, it is not at all clear whether a cognizable liberty interest has been affected in the absence of an adverse effect on future employment. See id.; Board of Regents v. Roth, supra; Bishop v. Wood, supra. Secondly, plaintiff has failed to allege a stigma arising from the alleged deprivation of due process. The files containing the allegedly stigmatizing medical evaluations have not been shown to, nor are they available to, prospective employers. Indeed, there is no allegation that plaintiff has sought, let alone been deprived of, alternative employment because of the stigmatizing matter in the files. Moreover, plaintiff's file contains letters from her own physician and herself corroborating, at least in part, the medical evaluations. Cf. Codd v. Velger, supra (absence of allegation of falsity of "stigmatizing" report fatal to complaint).

Finally, although plaintiff complains of a denial of due process, she herself has failed to avail herself of

the remedies opened to one declared medically unfit. She failed to pursue reexamination and review by the ad hoc committee -- the very first step in the due process machinery available to a teacher seeking to reverse such a finding.

Accordingly, defendants' motion for summary judgment addressed to the complaint of plaintiff LaFrances Hills is granted since plaintiff has failed to state a claim upon which relief may be granted.

VI

Plaintiff Alice Lubitch avers in the complaint that:

> Plaintiff Alice Lubitch is a duly licensed, fully tenured physical education teacher at Martin Van Buren High School in Queens with more than 13 years experience. She was physically injured when she was hit by a volleyball during the course of her employment. Defendants denied her disability without a hearing and without even a physical examination. Her own doctor's letters have been ignored and his findings have been disapproved and she was found physically fit although she is unable to work at the present time. After this finding, she returned to work December, 1974, but was unable to work on a regular basis. She was ordered to report for a medical examination and has been found "apparently unfit". Yet, the Board in lieu of paying her disability has put her on leave of absence without pay!!

> Plaintiff had no right to a hearing, no right to present witnesses, and no indication that her physician's letters were evaluated.
>
> The only "right" she has by regulation is to take a leave of absence without pay which requires her to relinquish her seniority rights.
>
> By virtue of the rules and regulations of the Board of Education, plaintiff has been denied the right to be compensated for her injury without due process of law.
>
> Complaint paragraphs 37-40.

In April 1974 and again in April 1975 plaintiff made virtually identical allegations in Kings County Supreme Court actions. Defendants' Rule 9(g) Statement re: Plaintiff Alice Lubitch, Exhibits A, J, briefed the constitutional issues concerning due process, id., Exhibits D, E, I, and received the following adjudications:

> Petitioner strains to interject a due process issue in this proceeding but the court finds no such issue involved. Respondents followed the statute which sufficiently satisfied the due process requirements of the constitution. Petitioner received all proper notices; she was permitted to introduce her own medical proof to support her position. Contrary to petitioner's assertions, she was given copies of respondents' medical reports to assist her in her presentation.
>
> The only real issue in controversy is

the conflicting medical opinions of the parties. However, the mere existence of a medical difference of opinion does not warrant a finding that respondents were acting arbitrarily (Matter of Strauss v. Hannig, 256 Appellate Division 662, affd. 281 N.Y. 612; Matter of Albury v. New York City Civil Service Commission, 32 A D 2d 895.) Moreover, the findings of respondents were based on credible evidence and there is a rational basis for respondents' determination and, under these circumstances, the court will not substitute its judgment for that of the administrative agency. The actions of respondents were neither arbitrary nor illegal (McCabe v. Hoberman, 33 A. D. 2d 547).

Accordingly, petition is dismissed in all respects.

Settle order on notice.

In re Alice Lubitch v. Board of Educ. of the City of New York and Teachers Retirement System of the City of New York, Index No. 5844/74. (Sup Ct Kings County, Special Term I, Oct. 25, 1974).

In this Article 78 proceeding petitioner purportedly challenges respondent's placing petitioner on leave without pay for restoration of health.

If petitioner truly seeks to challenge respondent's ruling she need merely report for work and maintain a normal work schedule. It is of no matter to either party if petitioner be deemed fit or unfit for duty. The pivotal issue is whether petitioner's condition, whatever it is, is medically related to her previous duties. Respondent's contention that such condition is not related

> was upheld by Judge Schwartzwald who dismissed an earlier Article 78 proceeding for the same relief. In reality, petitioner seeks to relitigate that earlier proceeding and this she cannot do; res judicata bars her path (Friedman v. State of New York, 24 N Y 2d 528, 535).
>
> Accordingly, the petition is dismissed.
>
> Settle order.
>
> In re Alice Lubitch v. Board of Educ., Index No. 9164/75 (Sup Ct, Kings County, Special Term I, Aug. 6, 1975).

Plaintiff filed a notice of appeal from each decision.

It is clear that plaintiff did more than merely mention "due process" in the state court litigation and defendants are correct in concluding that:

> Even under the most liberal and expansive interpretation of Lombard [v. New York City Transit Authority, supra,] and Newman [v. Board of Educ., supra,] the claims of plaintiff Lubitch are barred as they were fully raised in the previous state proceedings. They are "elaborated" upon in every paper filed by plaintiff in those proceedings by or on behalf of Lubitch. The memorandum submitted by plaintiff's counsel are replete with "citations of authority" and further elaboration. Finally the appeal statement cites a denial of due process as the basis for appeal. The claims are indistinguishable.
>
> Defendants' Memorandum of Law at 11.

"Thus, while it is clearly a federal policy to allow every plaintiff with a colorable claim his day in court, it is equally clearl, not a court's duty to encourage career litigants by allowing federal duplication of state trials," and Lubitch's claim must be barred by res judicata. Thistlewaite v. City of New York, supra. Accord, Brown v. DeLayo, 498 F2d 1173 (CA10 1974); Montagna v. O'Hagan, 402 F Supp 178 (EDNY 1975). Moreover, even if res judicata did not bar plaintiff's claim summary judgment in favor of the defendants would be appropriate. See Siletti v. New York City Employee's Retirement System, 401 F Supp 162, 167-68 (SDNY 1975). Accordingly, defendants' motion for judgment on the Lubitch claim is granted.

VII

Plaintiff Mary McAulay seeks damages as well as declaratory and injunctive relief stemming from her claims that she was stigmatized as a result of "unsatisfactory" ratings received in 1971 and 1973 and that she was "illegally" transferred from one school to another. Turning first to the alleged involuntary transfer, it is unclear from the complaint whether this plaintiff is referring to a transfer from Seward Park High School to Washington Irving High School in 1971 or

from Seward Park to John F. Kennedy High School in 1973. In either event, however, plaintiff has failed to state a claim upon which relief can be granted.

While it is true that in 1971 plaintiff McAulay was ordered to transfer, the state courts stayed the order and the transfer never occurred. McAulay v. Board of Educ., 46 App Div 2d 84 (1st Dep't 1974). Moreover, any residual claim which may arise from the attempted transfer is now barred by the statute of limitations. Kaiser v. Cahn, 510 F2d 282 (CA2 1974); Swan v. Board of Higher Educ., 319 F2d 56 (CA2 1963). In addition, plaintiff's transfer in 1973 was not "involuntary" since it was one for which she herself applied. Defendants' 9(g) Statement re: Plaintiff McAulay, Exhibit A.

Plaintiff's grievance concerning the "unsatisfactory" ratings also fails to state a claim upon which relief can be granted. As with plaintiff Bobrowsky, see II, supra, McAulay did not suffer a deprivation of liberty or property without due process of law since she was not terminated from her teaching position. See Board of Regents v. Roth, supra; Bishop v. Wood, supra; Paul v. Davis, supra. In addition, not only were both "unsatisfactory" ratings reversed in subsequent proceedings, but the possibility that one of the ratings has

not been formally removed from her official records does not rise to the level of a constitutional deprivation sufficient to invoke the jurisdiction of this court.

Accordingly, defendants' motion for summary judgment addressed to the complaint of plaintiff Mary McAulay is granted.

VIII

On February 8, 1974 plaintiff Joseph McCrum, a tenured teacher at Lafayette High School, was charged with incompetent and inefficient service and suspended with pay. In April 1974, plaintiff was notified that a hearing on the charges was scheduled for June 3, 1974 and was given a copy of the specifications of the charges against him. Pursuant to New York Education Law §2573-7 and §105 of the By-Laws, a hearing on the charges and specifications was conducted before a trial examiner, with plaintiff represented by counsel, allowed to present and cross-examine witnesses, and permitted to submit all relevant and material evidence in his defense.

At the conclusion of the hearing, the trial examiner recommended that the charges made against plaintiff be sustained and that plaintiff be removed as a teacher.

Although on January 22, 1975 the board adopted the recommendations of the trial examiner and ordered plaintiff discharged, the board annulled this resolution in the face of Fogel v. Board of Educ., supra, which required that, upon request, the report and recommendations of the trial examiner be made available for comment and written response by the teacher. The plaintiff thereafter responded to the findings and recommendations of the trial examiner and, after reviewing all the evidence before it and the plaintiff's response, the board adopted the recommendations of the examiner and, by resolution dated March 24, 1976, ordered plaintiff dismissed from service.

Although the Second Circuit has already commented that "New York is quite protective of the rights of tenured teachers and supervisors", Fuentes v. Roher, 518 F2d 379, 383 (CA2 1975), plaintiff nonetheless challenges the hearing procedures as violative of due process. The 11 alleged defects in the hearing procedure listed by plaintiff in the complaint, however, are meritless.

The charges, as amplified by the specifications, are more than adequate to advise the plaintiff of the nature of the accusations. See Arnett v. Kennedy, 416 US 134 (1973)

(upholding "for such cause as will promote the efficiency of the service" charge). The claims that the disciplined teacher did not receive the recommendations of the hearing officer or was not given an opportunity to respond are frivolous in that plaintiff was given and responded to the report. Similarly lacking in substance are the claims that the board failed to set forth the basis for the decision (they specifically adopted the trial examiner's report), that charges need not be supported by substantial evidence (trial examiner found charges supported by preponderance of the evidence), and that there is no indication that the evidence is considered by the board (the resolution recited review of the evidence).

Plaintiff's remaining challenges concerning the impartiality of the trial examiner are equally unpersuasive. As with the late Hon. Francis E. Rivers in the instant case, trial examiners are generally former judges and hold no other position with the board. Even the combination of investigative and adjudicative functions, which is not present herein, does not, without more, create an unconstitutional risk of bias. Withrow v. Larkin, 421 US 35 (1975). Moreover, hearing officers "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly

on the basis of its own circumstances." Id. at 47-48 citing United States v. Morgan, 313 US 409, 421 (1941). The fact that a hearing officer is paid by the board does not in and of itself constitute bias, see Goldberg v. Kelly, 397 US 254, 271 (1970), and, in the absence of any specific allegations to the contrary, or even a minimal showing of specific prejudice, merely conclusory charges levelled at a presumed impartiality of a trial examiner are legally insufficient to support a claim of deprivation of due process. See Withrow v. Larkin, supra; Fuentes v. Roher, supra; Lopez v. Henry Phipp Plaza South, Inc., 498 F2d 937, 944 (CA2 1974).

Accordingly, defendants' motion for summary judgment addressed to plaintiff Joseph McCrum's challenge to his dismissal in accordance with the board's policies and procedures is granted.

IX

In April 1971 plaintiff Maurice Mendoza began service as a bilingual professional assistant pending the results of the physical and medical examinations required of all applicants for a teaching position with the board and authorized by New York Education Law §2569. In April 1972

plaintiff underwent his medical and physical exams; however, on September 5, 1972, the Committee on Medical Examination agreed with the recommendation of the Medical Division that plaintiff was medically and psychologically "not fit" for service. Plaintiff was then notified that his application for a certificate of competency had been denied and his services were terminated as of December 31, 1972.

Although plaintiff's complaint advances both a claim for a denial of a liberty interest without due process and a claim for racial discrimination in employment, he concedes in his memorandum of law dated November 15, 1976, page 25, that the discrimination claim, now pending in another action in this court, is not at issue here. Turning, then, to the alleged deprivation of a liberty interest resulting from being found "unfit" for service, plaintiff's claim, if any, is barred by the statute of limitations.

The acts complained of by plaintiff Mendoza, including his dismissal as well as the medical examination itself, all occurred on or before December 31, 1972. Since the instant complaint was filed on or about February 16, 1976, the applicable three-year statute of limitations precludes litigation of the claim. Meyer v. Frank, Docket No. 76-7172

(CA2 January 12, 1977); Ortiz v. LaVallee, 442 F2d 912 (CA2 1971). Accordingly, defendants' motion for summary judgment addressed to the claims of plaintiff Maurice Mendoza is granted.

X

Plaintiff Pamela Marland, a tenured teacher at Seward Park High School, was rated "unsatisfactory" by her principal in 1973. Although plaintiff's administrative appeal of the rating was unsuccessful, the rating was subsequently reversed by the courts on procedural grounds. In re Pamela Marland v. Board of Educ., Index No. 17060-1974 (Supreme Court, NY County, Special Term I, June 20, 1975).

Since she is presently employed as a tenured teacher, she cannot, as already discussed, be heard to complain that an "unsatisfactory" rating received by her in 1973 and reversed in 1975 denied her a liberty or property interest without due process of law. Board of Regents v. Roth, supra; Bishop v. Wood, supra; Paul v. Davis, supra. Accordingly, summary judgment should be entered against the claim of plaintiff Pamela Marland.

XI

In addition to the specific, more concrete allegations of the complaint adjudicated above, each plaintiff also makes general, conclusory, and sometimes inconsistent allegations -- e.g., first amendment claims based on the "retaliatory" motives behind an "unsatisfactory" rating; racial discrimination perpetrated against plaintiff Mendoza (despite the concession in the memorandum of law, see IX, supra); and elements of sex discrimination behind the allegations of the female plaintiffs. Despite the court's request at oral argument that the plaintiffs refine and document their allegations, the supplemental memorandum of law received in no way elucidated these conclusory charges and, in many instances, these issues were not even addressed. Despite the concern for protecting a plaintiff's constitutional rights, the courts in this circuit have not been reluctant to dismiss actions where there is an insufficient factual basis on which to predicate relief. See, e.g., Buck v. Board of Elections, Docket No. 75-7355 (CA2 May 27, 1976); Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck, 463 F2d 620 (CA2 1972); Powell v. Workmen's Compensation Board, 327 F2d 131 (CA2 1964).

**MEMORANDUM AND ORDER OF HON. GEORGE C. PRATT**

Plaintiffs having failed to provide a factual basis sufficient to support these diffuse claims asserted against the defendants, coupled with the infirmities in the complaint discussed in I through X above, defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety.

SO ORDERED.

Dated: Westbury, New York
March 8, 1977.

GEORGE C. PRATT
U. S. DISTRICT JUDGE

## COMPLAINT

SAME CAPTION

Plaintiffs, by their attorney, JOAN GOLDBERG, allege as follows:

### JURISDICTION

1. This action arises under the Constitution of the United States, in particular the First, Fourth, Ninth and Fourteenth Amendments thereto. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1331, 1346 and 2201 and 42 U.S.C., Sec. 1983.

2. The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

### PARTIES

3. Plaintiff Teachers United for Fair Treatment and the individual plaintiffs named herein are teachers--prospective teachers, teachers on probation, tenured teachers and/or teachers who have been dismissed by the defendants acting in their individual and official capacities as officials of the Board of Education of the City of New York.

4. Plaintiffs seek a judgment invalidating and enjoining the defendants from enforcing New York State Education Law, Sections 2590-j and 2568, the By-Laws of the Board of Education, Sections 105 and 105(a), and all other procedures under which they have been or may be transferred, suspended and dismissed from the New York

City public school system without a hearing and in violation of their constitutional rights.

5. Plaintiff, Teachers United for Fair Treatment, is a non-profit organization whose membership consists of 125 teachers who have been disciplined by the Board of Education. The organization was formed to aid its members who have been unfairly subjected to discipline at the grievance level, at hearings before the Board of Education, and through the arbitrary use of medical and psychiatric examinations. The decision as to the type of litigation supported by the organization is made by secret ballot, majority vote.

6. Kenneth Bobrowsky is a fully-licensed, fully-tenured teacher at the Bronx High School of Science with more than 15 years of experience. He was rated unsatisfactory by his principal and said rating was upheld by defendant Anker.

7. Blossom Fogel was a fully-tenured teacher with approximately 15 years experience who has been unfairly disciplined pursuant to Section 105(a) and has been dismissed pursuant to Section 105 of the By-Laws of the Board of Education.

8. Harriet Greenbaum is a fully-tenured, fully-licensed teacher of library science. She has had four years teaching experi-

ence and more than 11 years as a library teacher. She has received a single unsatisfactory rating from her principal at Erasmus Hall after she refused to accept a transfer so her position could be filled by a friend of the principal. This rating was dismissed as illegal. As additional retaliation she has been brought up on charges and wrongfully transferred without a hearing. The charges are presently before a hearing officer appointed by the Board of Education. Both the unsatisfactory rating and the dismissal were based on the same alleged acts of Greenbaum.

9. LaFrances Hills was a probationary teacher under the Board of Education and has been declared unfit arbitrarily as a result of psychiatric examination.

10. Alice Lubitch is a fully-licensed tenured teacher with the Board of Education who was injured in-line-of-duty and has been wrongfully denied disability benefits to which she is entitled. She was declared fit when she submitted a request for disability retirement and, when she thereafter returned to work, was declared unfit because she is actually physically unable to work a full day.

11. Mary McAulay, a fully-licensed teacher, has been unfairly disciplined by the Board of Education, pursuant to Section 105(a), illegally ordered transferred. She is also the President of Teachers United for Fair Treatment.

12. Joseph McCrum is a fully-licensed teacher who has been unjustly and arbitrarily disciplined and dismissed by the Board of Education pursuant to Sections 105 and 105(a) of the By-Laws of the Board of Education.

13. Maurice Mendoza is a teacher with a certificate of competence who has passed the written and oral examination to be licensed as a bi-lingual teacher for the Board of Education and who has been unfairly denied such license without reason allegedly as a result of a psychiatric examination.

14. Pamela Marland is a fully-licensed tenured teacher for the Board of Educa[illegible]ith more than 18-1/2 years experience who had been rated unsatisfactory pursuant to Section 105(a) in violation of the First and Fourteenth Amendments to the United States Constitution. This was also in violation of the By-Laws of the Board of Education, and the rating was reversed.

15. Defendants Anker, Robinson and Regan are officers of the Board of Education of the City of New York, which is a body politic duly organized under the laws of the State of New York, located at 110 Livingston Street, in the Borough of Brooklyn, County of Kings, City and State of New York.

16. Although the Board of Education of the State of New York have promulgated rules and regulations for appealing from unsatisfactory ratings and notwithstanding the procedure set up to provide a hearing for teachers prior to dismissal, the Board of Education of the City of New York, by the defendants, have consistently applied these procedures in an unfair and arbitrary way

(1) to uphold virtually every unsatisfactory rating given by a principal; (2) to dismiss every teacher sought to be dismissed, and (3) to declare psychiatrically unfit every teacher examined pursuant to request of a supervisor.

AS AND FOR A FIRST CAUSE OF ACTION

17. Plaintiff Blossom Fogel is a citizen of the United States, resident of the Borough of Brooklyn, County of Kings, City and State of New York. She had been a duly licensed fully-tenured teacher and guidance counselor for more than 15 years. She had been continuously satisfactory and one year was nominated as American School Guidance Counsellor of the Year. She was appointed to William Maxwell Vocational High School, where her record was outstanding until she filed a grievance against her principal, Murray Weinman. In retaliation, he rated her unsatisfactory as a guidance counselor and unsatisfactory on the high school assistant principal's examination, although she had passed both the written and the oral examinations. He then had her illegally transferred out of the school over her objections and without a hearing.

Plaintiff was transferred to Alexander Hamilton High School as guidance counselor over her objection and the objection of the principal of that school, Jacob Spinner. Within two weeks after commencing work he told her that she would receive an unsatisfactory rating at the end of the term. She received the "U" rating as promised.

As a result of receiving two unsatisfactory ratings she was brought up on charges pursuant to Section 105 of the regulations of the Board of Education and dismissed as a teacher for "conduct unbecoming a teacher." The transcript of the 105 hearing indicates that the evidence does not support the charges. Yet more than 2-1/2 years have lapsed since her illegal dismissal and the Board of Education, by the defendants, have not paid her salary to date.

18. Plaintiff Joseph McCrum is a teacher who has been rated unsatisfactory as a teacher since 1967 when he entered a school and taught during the chool strike. He appealed such ratings pursuant to Section 105(a) and at each hearing the principal's rating was upheld without indicating reasons therefor. As a result of his unsatisfactory ratings he was brought up on charges and he has been dismissed as a teacher pursuant to Section 105 of the By-Laws of the Board of Education.

19. Plaintiff Harriet Greenbaum was rated satisfactory every year of service until she refused to transfer. She was brought up on charges based on the same facts that were alleged to support her single unsatisfactory rating. The "U" rating was dismissed. The dismissal proceeding is in progress.

20. In each of the aforementioned cases (except Greenbaum) prior to filing charges against the teacher, the teacher had been rated unsatisfactory as a teacher and such rating was upheld pursuant to Section 105(a) of the By-Laws of the Board of Education.

21. New York Education Law, Section 2590-J-7 and Section 105 of the By-Laws of the Board of Education set forth virtually identical procedures for dismissing a teacher. These sections are as follows:

"§ 2590-j.

7. Each community board shall, subject to the provisions of paragraph (e) herein, have authority and responsibility with regard to trials of charges against any members of the teaching or supervisory service staffs of the schools within its jurisdiction as follows:

(a) No such employee who has served the full and appropriate probationary period prescribed by, or in accordance with law, shall be found guilty of any charges except after a hearing and by the affirmative vote of a majority of all the members of the community board. The community board shall have the right to impose a penalty on an employee, consisting of a reprimand, a fine, suspension for a fixed time without pay, or dismissal, or transfer within the district or any one or more of them.

(b) Charges may be initiated by the community superintendent against any such employee for any of the following offenses:

(1) Unauthorized absence from duty or excessive lateness;
(2) Neglect of duty;
(3) Conduct unbecoming his position, or conduct prejudicial to the good order, efficiency or discipline of the service;
(4) Incompetent or inefficient service;
(5) A violation of the by-laws, rules or regulations of the city board, chancellor, or the community board; or

(6) Any substantial cause that renders the employee unfit to perform his obligations properly to the service.

(c) The community superintendent, in advance of the filing of charges and specifications, shall inform the employee accused and the community board

of the nature of the complaint. No charges shall be brought more than six months after the occurrence of, the discovery thereof, or the date when discovery should have occurred upon the exercise of due diligence, of the alleged incompetency or misconduct except where the charge is of misconduct constituting a crime when committed.

(d) The employee charged shall be given an opportunity to be heard, in person or by counsel, including the right to receive a copy of the charges and specifications, and shall be entitled to cross-examine opposing witnesses and to call and examine witnesses in his own behalf.

(e) Upon the service of a copy of the charges upon such employee and the filing thereof with the community board, the community superintendent may recommend to the chancellor the suspension of any such employee. If the chancellor shall determine that the nature of the charge requires the immediate removal of the employee from his assigned duties, he may suspend such employee for a period not exceeding ninety days pending hearing and determination of charges, provided, however, that such employee shall be entitled to receive full compensation during the period of suspension. In case the employee is acquitted, he shall be restored to his position.

(f) The community board on receipt of a notice of charges by the community superintendent against any employee shall appoint one or more trial examiners. The assigned trial examiner or examiners shall be selected from a panel of competent persons maintained by the chancellor. The trial examiner shall administer the oath to all appropriate witnesses. A trial examiner shall have the power to subpoena witnesses, papers and records. The provisions of the civil practice law and rules in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee or other person in a matter not arising in an action in a court of record apply to a subpoena issued by a trial examiner as authorized by this subdivision. The report of any trial examiner shall be subject to final action by the community board, each member of which shall before voting review the testimony and acquaint himself with the evidence in the

case. The community board may reject, confirm or modify the report of the trial examiner or examiners. The decision of the community board shall be based solely upon the record in the proceedings before the trial examiner, and shall set forth the reasons and the factual basis for the decision. A vote of the majority of all members of the board shall be necessary for a finding of guilt and to impose a penalty or punishment. The employee may appeal to the city board from any adverse determination or penalty imposed by such community board. The city board after reviewing the record in the case, shall have the power to make a final determination in the case subject to any provision for arbitration that may exist in agreements between the city board and the organization representing such employee, not inconsistent with applicable law. nothing contained in this section shall preclude an aggrieved employee from seeking a review of such final determination by the commissioner or the courts as prescribed by law."

"Section 105. 1. No member of the teaching and supervising staff, including examiners, of the administrative staff or of the attendance staff, who has served the full and appropriate probationary period prescribed by, or in accordance with law, shall be removed, except for cause after a hearing, by the affirmative vote of a majority of all the members of the Board of Education. Any such member may be suspended by the Superintendent of Schools, sho shall report his action at the next regular meeting of the Board of Education, when the facts relating to the case shall be submitted to the Board for its consideration and action.

2. Charges may be preferred against any member included in the preceding subdivision for:

(a) Unauthorized absence from duty or excessive lateness;

(b) Neglect of duty;

(c) Conduct unbecoming his position, or conduct prejudicial to the good order, efficiency or discipline of the service;

(d) Incompetent or inefficient service;

(e) Failure to comply with the provisions of subdivision 40 of Section 90 relative to contracting debts.

(f) Violation of the By-Laws, rules or regulations of the Board of Education; or

(g) Any substantial cause that renders the member unfit properly to perform his obligations to the service.

3. The member against whom charges have been preferred shall, in person or by counsel, be entitled before the trial to receive, on due demand, a copy of the charges and specifications, and shall be entitled to participate in person or by counsel, or both, in the trial of the charges, to cross-examine opposing witnesses and to call and examine witnesses in his own behalf.

4. The service of charges shall be effected in the following manner:

(a) By the personal delivery of a copy of the charges and specifications to the accused by a person qualified to serve a summons in an action at law in the State of New York;

(b) Or, if personal delivery cannot with reasonable diligence be made, by leaving a copy of the charges and specification at his place of residence with some person of an age of discretion and by notifying such person of the nature of the papers;

(c) Or, if personal delivery cannot with reasonable diligence be made, by publication of the notice of hearing at least once in each week for two consecutive weeks, not more than eight days elapsing between such dates of publication, in a newspaper designated by the Board of Education and published in the county in which the last known place of residence of the accused is located; and such publication shall include a notice stating that a hearing on the charges will be held at a time specified in said notice, which time shall not be less than ten days from the date of the first publication, and also that such notice is published pursuant to an order of the Board of Education.

An affidavit made by the person serving the charges or by the person authorized to contract for the publication of the said charges, showing

the time and place and the manner of such service, whether personal or by publication, shall be presumptive proof of the facts therein set forth.

5. The Superintendent of Schools, upon suspending any member, and in advance of the filing of charges and specifications, shall inform the accused and the Board of Education of the character of the charges to be met. Such information shall not prevent the including in the trial of additional charges and specifications, provided the accused is informed thereof.

6. If after due and timely service as defined in subdivision 4 hereof, the member against whom charges have been preferred fails to put in an appearance at the time and place set for trial, either in person or by counsel, the trial of the said charges shall proceed and be determined in the same manner as though the accused were in personal attendance or represented by counsel; and the findings and judgment of the Board shall forthwith be executed.

7. The Board of Education, on receiving notice of charges against an employee, shall proceed to try and determine the case, either in the Board of Education or by a committee of its body consisting of one or more members; or by the assignment of one or more of its employees as trial examiner. The report of any such trial committee or trial examiner shall be subject to final action by the Board of Education, each member of which shall, before voting, read the testimony and evidence in the case. A vote of the majority of all members of the Board shall be necessary for a finding of guilt or to impose a penalty or punishment."

22. In each of the aforementioned cases the named plaintiff has been dismissed at a hearing which denied them due process of law. All teachers are subjected to these rules, regulations and statutes which do not permit them a fair hearing and which have a chilling effect on protected liberties. The regulations

violate the First, Fifth and Fourteenth Amendments to the Constitution in that:

(a) they do not provide adequate notice as to prohibited conduct;

(b) adequate and sufficient notice of specifications are not provided prior to hearing;

(c) the disciplined teacher does not receive notice of the reasons for the decision of the hearing officer;

(d) there is no adequate opportunity to reply to findings of the hearing officer;

(e) the Board of Education dismisses the teacher without setting forth the basis for the decision;

(f) there is no indication that any of the evidence is considered by the Board;

(g) the hearing officer is not an independent, impartial finder of fact;

(h) the hearing officer consistently recommends dismissal of the teacher;

(i) there is no opportunity to conduct a voir dire to determine whether the hearing officer is familiar with the case;

(j) there is no requirement that the charges be supported by substantial evidence;

(k) the hearing officer is paid by the Board of Education.

23. By virtue of said denial of due process plaintiffs have been denied or will be deprived of their livelihood without due process of law.

AS AND FOR A SECOND CAUSE OF ACTION

24. Plaintiff Kenneth Bobrowsky is a citizen of the United States and a resident of the State of New York, a fully licensed and tenured teacher in the Bronx High School of Science in the Borough of the Bronx, City and State of New York. He has taught for more than 15 years and, in addition, is an outstanding teacher in his field (biology). He has consistently been rated satisfactory and has been recognized nationally for his ability. Nevertheless, he was rated unsatisfactory as a teacher by his principal in 1973. This has stigmatized him and significantly diminished his ability to obtain outside employment.

25. Plaintiff repeats and realleges all of the facts set forth in Paragraph 17 relating to Blossom Fogel.

26. Pamela Marland is a duly licensed tenured teacher at Seward Park High School with more than 18-1/2 years satisfactory experience. She was rated unsatisfactory as a teacher by her principal because she refused to falsely testify in his behalf against Mary Anilyan at the City Commission on Human Rights and she vocally supported the UFT chapter leadership in a fight for teachers' rights within the school.

Rating her unsatisfactory was solely a retaliation for refusing to falsely testify and compromise her integrity. The use of this rating is an attempt to coerce her conduct and to deter other teachers at the school from exercising their rights under the First Amendment.

27. Plaintiff herein repeats and realleges all of the facts set forth in Paragraph 18 with respect to Joseph McCrum.

28. Section 105a of the By-Laws of the Board of Education states as follows:

> "1. Any person in the employ of the Board of Education who is summoned to appear before the Superintendent of Schools or a committee designated by him, in respect of the discontinuance of service during the probationary term, or at the expiration thereof, or a denial of increment in salary, or appeals from ratings, shall receive written notice of the time and place of the meeting, mailed to the person so summoned at least one week before the date specified for the said meeting, and addressed either to the school or to his last-known post-office address, specifying the matter to be considered. The notice shall inform the said person that he is entitled to appear in person, to be accompanied and advised by an employee of the Board of Education, to be confronted by witnesses, to call witnesses and to introduce any relevant evidence. The attendance of such adviser and witnesses shall not be deemed absence from official duty except pursuant to such rules as the Superintendent of Schools shall prescribe. No person shall serve as adviser in more than two matters in a school year. No person in the employ of the Board of Education shall request or accept directly or indirectly any remuneration or other consideration for service as adviser or witness. A record tape or disc shall be kept of the proceedings where practicable in the form of a recording. The person thus summoned shall be entitled to examine exhibits and, in addition, shall be entitled to receive a duplicate of the sound recording discs or tapes of the proceedings, at cost. In the event that the sound recording equipment is not available or

breaks down during the interview, minutes shall be taken of the proceedings and said minutes shall be available to the person summoned upon reasonable written notice and upon payment to the Board of Education of fifty cents a folio.

A person appealing from a rating shall submit a notice of appeal in a letter form to the Superintendent of Schools within three weeks from the receipt of said rating, exclusive of the summer vacation period. The appellant shall be entitled to receive from the rating-officer within three weeks of the filing of such notice, exclusive of the summer vacation period, a written statement of the reasons, facts and conditions upon which the rating-officer based the rating from which the appeal is taken. Said appellant shall, within three weeks, prepare and submit to the Superintendent of Schools the written answer to the written statement of the reasons, facts and conditions, upon which the rating officer based the rating. Such three weeks shall begin the day after the written statement of the rating-officer has been forwarded to the school or to the last-known address of the appellant. The Superintendent of Schools shall designate a committee before whom the appellant and other officially interested persons shall be summoned. The Committee shall review the matter as soon as practicable, but in any event not later than one year from the date of receipt of said rating by the appellant. The findingsof the committee shall be submitted to the Superintendent of Schools for final decision. (As added Sept. 29, 1960.)

2. Any person in the employ of the Board of Education who is summoned to appear before the Superintendent of Schools, or any person or a committee designated by him, for the determination of such person's ability to render continuous and efficient service as based on medical reports, shall receive written notice of the time and place of the meeting, mailed to the person so summoned, addressed either to the school or to his last-known post office address, specifying the matter to be considered, at least one week before the date specified for the said meeting. The notice shall inform the said person that he is to appear in person, and, if he so elects, may be accompanied and advised by an employee of the Board of Education,

and introduce any relevant evidence. The attendance of such adviser shll not be deemed absence from official duty, but such persons shall not absent themselves from school duty, except pursuant to such rules as the Superintendent of Schools shall prescribe. No person shall serve as an adviser in more than two matters in a school year within the provisions of this Section. No person in the employ of the Board of Education shall request or accept directly or indirectly any remuneration or other consideration for service as adviser."

29. In each of the aforementioned cases each of these plaintiffs has been rated unsatisfactory as a teacher at a hearing pursuant to Section 105(a) of the By-Laws of the Board of Education, which denied them due process of law in that:

(a) They had no right to counsel at their hearings;

(b) In each case the hearing officer was an employee of the Board of Education, or is on a small panel of "hearing officers" paid by the Board and dependent upon the Board for their livelihood;

(c) In each case plaintiffs were punished for exercising lawful protected activities under the First Amendment to the Constitution;

(d) The actions of defendants were in violation of plaintiffs' right to freedom of speech, press and association and to petition for a redress of grievance as guaranteed by the First and Fourteenth Amendments to the Constitution;

(e) The By-Laws of the Board of Education were violated in that there was no independent observation of these teacher

by an assistant superintendent, pursuant to Section 41(3)(e).

(f) No copy of a transcript is supplied to plaintiffs making it virtually impossible to contest the validity of the Board's action;

(g) The Chancellor makes the final decision without listening to the tapes and without any knowledge of the evidence;

(h) The decision is always against the teacher, except where there is a glaring technical error.

30. By virtue of the actions of defendants in upholding the unsatisfactory ratings the plaintiffs have been deprived of their livelihood and the benefits of their teaching, their professional reputation has been damaged, and they have been otherwised stigmatized which significantly diminishes their ability to obtain employment.

AS AND FOR A THIRD CAUSE OF ACTION

31. Plaintiff LaFrances Hills is a duly licensed health teacher and early childhood teacher for the Board of Education of the City of New York. She was ordered by her principal to take a psychiatric examination as retaliation for her refusal to dress in a manner that her principal though was appropriate. Plaintiff Hills is a black woman who wore her hair in an "afro" and slacks to teacher her pre-school class. As a result of psychiatric examination before a Board-selected psychiatrist plaintiff Hills was ordered not to return to work resulting in loss of earnings, damage

to her professional standing and reputation, and inability to secure another teaching position.

Subsequently, plaintiff has attempted to collect disability benefits under social security, but such benefits have been denied because she has been found fit to work.

32. Plaintiff Maurice Mendoza is a bilingual teacher who had a certificate of competency and was appointed under temporary license. He subsequently passed the written examination and oral interview. Yet he was failed on the physical examination without any reason therefor. Upon request, his doctor was advised that he was not appointed because of emotional problems. He never received the results of this examination and he never received the reasons for his non-appointment. He has been examined by a private psychiatrist who has indicated that he is in good mental health. He is not under psychiatric care nor has he ever been institutionalized for psychiatric illness. Plaintiff Mendoza is of Hispanic background and has arbitrarily been denied appointment in the professional in which he has been trained resulting in loss of earnings.

33. Section 2568 of the New York State Education Law states as follows:

> "Superintendent of schools authorized to require medical examination of certain employees of cer- boards of education
>
> The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by the board of education of such city to submit to a

> medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the superintendent of schools and may be referred to and considered for the evaluation of service of the person examined or for disability retirement."

34. In each of the aforementioned cases the plaintiffs have been damaged as the result of a medical/psychiatric examination which was held in violation of law, in that:

(a) There was no hearing to determine whether the reasons set forth by the supervisor in requesting the psychiatric examination were accurate or just a subterfuge to remove the teacher;

(b) In each case an untrained person initiated the action requiring plaintiff to take a psychiatric examination;

(c) Such examination is an invasion of privacy under the Fourth, Fifth and Ninth Amendments to the United States Constitution;

(d) There was no reason given to plaintiffs for finding them medically/psychiatrically unfit;

(e) The psychiatrist is paid by the Board of Educa-

tion and is dependent on the Board of education for consultation fees;

(f) There is no opportunity to contest the finding of unfitness;

(g) There is no requirement that the teacher be found unfit to teach in the classroom in order to be dismissed.

(h) The actions of defendants are in violation of plaintiffs' rights to privacy and to a fair hearing before being disqualified from teaching on medical/psychiatric grounds.

35. By virtue of the action of defendants in declaring plaintiffs medically/psychiatrically unfit, plaintiffs' professional reputations have been damaged and they have been stigmatized by an unfair, inaccurate, incontestable psychiatric evaluation.

36. By virtue of the action of defendants, plaintiffs have suffered loss of earnings and their ability to obtain employment has been significantly impaired.

AS AND FOR A FOURTH CAUSE OF ACTION

37. Plaintiff Alice Lubitch is a duly licensed, fully tenured physical education teacher at Martin Van Buren High School in Queens with more than 13 years experience. She was physically injured when she was hit by a volleyball during the course of her employment. Defendants denied her disability without a hearing and without even a physical examination. Her own doctor's letters have been ignored and his findings have been disapproved and she

was found physically fit although she is unable to work at the present time. After this finding, she returned to work December, 1974, but was unable to work on a regular basis. She was ordered to report for a medical examination and has been found "apparently unfit". Yet, the Board in lieu of paying her disability has put her on leave of absence without pay!!

38. Plaintiff had no right to a hearing, no right to present witnesses, and no indication that her physician's letters were evaluated.

39. The only "right" she has by regulation is to take a leave of absence without pay which requires her to relinquish her seniority rights.

40. By virtue of the rules and regulations of the Board of Education, plaintiff has been denied the right to be compensated for her injury without due process of law.

AS AND FOR A FIFTH CAUSE OF ACTION

41. Plaintiffs repeat and reallege the facts and circumstances set forth in paragraphs 18 and 19 hereof.

42. Plaintiffs Fogel, McCrum, Greenbaum and McAulay have been transferred from their teaching positions over their objections and without a hearing.

43. Section 2590-J of the New York Education Law provides as follows:

"8. The community superintendent may transfer members of the teaching and supervisory service without their consent within the district for the following reasons only:

(a) Disciplinary action pursuant to subdivision seven of this section,...." (Emphasis supplied.)

Section 2590-J-7 provides in subsection (e):

"(e) Upon the service of a copy of the charges...the community superintendent may recommend to the chancellor the suspension of any such employee.../I/f the chancellor shall determine that the nature of the charge requires the immediate removal." (Emphasis supplied.)

44. None of the plaintiffs named above had a hearing prior to their transfers to determine whether their immediate removal was required.

45. Said rules regarding suspension and transfer are unduly vague and indefinite in that they fail to give notice as to what conduct will subject a faculty member to transfer or suspension and fail to establish reasonable standards by which to judge said conduct and is overbroad in that it includes conduct protected by the First and Fourteenth Amendments.

46. Said rule regarding suspension and transfer based on disciplinary action chills and deters plaintiffs herein and other faculty members from exercising their rights to freedom of speech, press, association and petition for the redress of grievances as guaranteed by the First and Fourteenth Amendments to the Constitution.

47. By virtue of the facts alleged in paragraphs 22,29 and 34 the action of defendants and their employees chill and deter the plaintiffs and other faculty members from exercising their rights to freedom of speech, press, association and to petition for redress of grievances under the First and Fourteenth Amendments to the United States Constitution.

48. By virtue of the facts alleged in paragraphs 42 and 45 the aforesaid actions of defendants, in transferring plaintiffs from the school in which they taught have damaged their professional reputations; deprived them of the right to continue to teach in schools where they have become established, and deprived plaintiffs of their rights under the Fourteenth Amendment and are in violation of the First Amendment and are thereby unlawful.

AS AND FOR A SIXTH CAUSE OF ACTION

49. Plaintiffs repeat and reallege paragraphs 41 and 42 hereof.

50. The actions of defendants in transferring or causing to be transferred the plaintiffs were for purposes of disciplining plaintiffs for their conduct and were not permitted by statute.

51. Plaintiffs were transferred because they were objecting to illegal prohibited conduct by their superiors.

52. At no time have plaintiffs had the opportunity to present evidence on their own behalf or to cross-examine and rebut claims of defendants as to their misconduct prior to said transfer.

53. By virtue of said transfer, plaintiffs were punished without a hearing and/or without an opportunity to appeal from such decision, thus depriving them of their right to continue teaching in a school where they had a right to remain under the Union contract and which subjects them to loss of professional reputation and standing in the community.

54. Plaintiffs have no adequate remedy at law and unless the court enjoins defendants from enforcing and implementing the statutes and By-Laws aforesaid, the plaintiffs will suffer or continue to suffer immediate, serious and irreparable injury.

AS AND FOR A SEVENTH CAUSE OF ACTION

55. Plaintiff Greenbaum repeats and realleges each and every allegation in paragraphs 8, 19 and 42 hereof as though fully set forth herein.

56. The unsatisfactory rating plaintiff Greenbaum received was declared to be illegal by the Commissioner of Education.

57. Plaintiffs McAulay and Marland repeat and reallege all of the facts set forth in paragraphs 11, 14 and 26, respectively

58. Plaintiffs McAulay and Marland appealed their unsatisfactory ratings to the New York State Supreme Court and said ratings were subsequently reversed.

59. Defendants have not corrected plaintiffs' files, but said files continue to reflect that the aforesaid teachers have received unsatisfactory ratings.

60. By wrongfully refusing to expunge the incorrect and inaccurate material in these plaintiffs' files, defendants are in violation of the law and are wrongfully and inaccurately maintaining inaccurate records for these teachers.

61. Said files are available for inspection for purposes of promotion, promotional examinations and other employment opportunities. By maintaining inaccurate records, plaintiffs will suffer or continue to suffer loss of professional reputation, loss of promotional opportunities and standing in the community.

62. Plaintiffs have no adequate remedy at law and unless this court requires the defendants to remove such improper and illegal material from the files plaintiffs will suffer or continue to suffer immediate serious and irreparable injury.

AS AND FOR AN EIGHTH CAUSE OF ACTION

63. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 7, 8, 9, 10, 11, 13, 14, 17, 26 and 31 hereof as though fully s forth herein.

64. In each case the principals of the schools where the within plaintiffs were employed rated the plaintiffs unfairly

and inadequately and willfully disregarded the rules and regulations of the Board of Education and the laws of the State of New York and the Constitution of the United States.

65. In each case the principal rated the plaintiff in bad faith and in a discriminatory manner, in that plaintiffs Fogel, Greenbaum, Hills, McAulay, Marland and Lubitch are women and plaintiff Mendoza is of Hispanic origin, and said ratings were arbitrary and capricious and based on (a) the discriminatory attitude of the principal, (b) protected speech and/or conduct of the teacher, and (c) refusal of the plaintiff to obey and unlawful request. Said ratings were therefore discriminatory and in violation of law and the Constitution of the United States.

66. By virtue of said ratings, plaintiffs were punished without a hearing, lost their jobs, lost their professional status, lost professional opportunities and were subjected to loss of professional reputations and standing in the community.

67. Plaintiffs have no adequate remedy at law and unless this court enjoins all principals from illegally rating plaintiffs, plaintiffs will suffer or continue to suffer immediate serious and irreparable injury.

AS AND FOR A NINTH CAUSE OF ACTION

68. Plaintiffs repeat and reallege all of the facts set forth in paragraphs 1 through 14 hereof as though fully set forth herein.

69. The willful discriminatory and illegal acts of the principals were accepted, confirmed and acted upon by the defendants knowing that said ratings or other disciplinary actions were unfair, arbitrary and discriminatory and in violation of law.

70. Defendants' actions in upholding every unsatisfactory rating and every recommendation for discharge of all teachers rated unsatisfactory and/or brought up on charges has a chilling effect on the conduct, behavior and speech of teachers.

71. Plaintiffs and other teachers in the Teachers United for Fair Treatment organization have been rated unsatisfactory and have lost their jobs because they are creative, critical, innovative, show concern for students, or in any way acted differently from other teachers who unquestioningly follow all directives of their principals although such directives may lead to inadequate performance of professional duties, and inadequate teaching of the students in the public school system in New York City.

72. Plaintiffs have been damaged, each of them, by the willful, wrongful, illegal conduct of defendants in the sum of Five Hundred ($500,000.00) Dollars, but the great harm wrought by the arbitrary and discriminatory actions of defendants is to the children of the City of New York who are deprived of the services of the teachers who wish to challenge their intelligence and innovate new programs to enhance the hearning opportunities of the children of New York City.

73. By virtue of said conduct, plaintiffs are deprived of their opportunity to be effective teachers and to act professionally as educators in the City of New York, to their detriment.

WHEREFORE, plaintiffs respectfully pray that the court grant the following relief:

(1) Issuance of a preliminary and permanent injunction restraining the defendants and their representatives, agents and successors from enforcing or threatening to enforce New York State Education Law, Sections 2590-j-7, 2568, and Sections 105 and 105(a) of the By-Laws of the Board of Education of the City of New York.

(2) Entry of a judgment, pursuant to 28 U.S.C. Sections 2201 and 2202, declaring that New York State Education Law, Sections 2590-j-7, j-8 and 2568, and Sections 105 and 105(a) of the By-Laws of the Board of Education of the City of New York violate the United States Constitution.

(3) Requiring a hearing prior to the ordering of a psychiatric examination for any teacher and declaring plaintiff Hills illegally terminated and returning her to work.

(4) Prohibiting defendants from ordering psychiatric evaluations of prospective teachers, unless each and every such teacher is required to undergo such examination.

(5) Prohibiting a transfer of any teacher without a hearing prior thereto.

(6) Ordering that hearings and other proceedings and examinations at any and all disciplinary procedures be before inde-

pendent hearing officers and/or physicians not on the Board of Education payroll, and that the dismissal of plaintiffs Fogel, Hills, Mendoza and McCrum be declared illegal and ordering their reinstatement with back pay where due, with annual increments, and any and all medical and dental benefits lost through illegal dismissal.

(7) Ordering the records of the above named teachers expunged of all derogatory letters, statements and ratings, and damages be paid to each named teacher in the sum of Five Hundred Thousand ($500,000.00) Dollars for damage to his or her professional reputation.

(8) Ordering the issuance of licenses for promotional opportunities where wrongfully withheld by virtue of illegal ratings or charges.

(9) Ordering a hearing for plaintiff Lubitch to determine her physical condition, at which hearing plaintiff and her physician may be present, and requiring the Board of Education to make available prior thereto the reasons for disallowing disability payments.

(10) For such other and further relief as to this court seems just and proper.

Dated: February 10, 1976.

**Verified February 10, 1976**
**by Mary McAulay.**

JOAN GOLDBERG
Attorney for Plaintiffs
370 Lexington Avenue
New York, New York 10017
(212) 725-5970

**ANSWER**

**SAME CAPTION**

Defendants, by their attorney, W. BERNARD RICHLAND, Corporation Counsel, answering the complaint:

1. Deny the allegations set forth in paragraphs "1" and "2" except admit that jurisdiction is purportedly invoked under 28 U.S.C. §1331, §1346 and §2201 and 42 U.S.C. §1983.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "3" except deny that defendants acted in their individual capacities.

3. Admit the allegations set forth in paragraph "4" except deny the implication that defendants have violated plaintiffs' constitutional rights.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "5" except deny any implication of unfair treatment.

5. Deny the allegations set forth in paragraph "7" except admit that plaintiff Fogel was a tenured teacher who received an unsatisfactory rating pursuant to Board of Education By-law §105-a and admit that she was dismissed pursuant to By-law §105.



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6. Deny the allegations set forth in paragraph "8" except admit that plaintiff Greenbaum's "unsatisfactory" rating was reversed by the State Commissioner of Education on procedural grounds.

7. Deny the allegations set forth in paragraph "9"

8. Deny the allegations set forth in paragraph "10".

9. Deny the allegations set forth in paragraph "11" except deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the last sentence of said paragraph.

10. Deny the allegations set forth in paragraphs "12", "13" and "14".

11. Deny the allegations set forth in paragraph "15" and respectfully refer the Court to Sections 2590-q and 2590-h of the Education Law, and further admit that defendants Anker, Robinson and Regan are officers.

12. Deny the allegations set forth in paragraph "16".

13. Deny the allegations set forth in paragraph "17" except admit that plaintiff Fogel was a teacher at William Maxwell High School and Alexander Hamilton High School and was dismissed.

14. Deny the allegations set forth in paragraph "18" except admit that plaintiff McCrum has received numerous unsatisfactory ratings pursuant to §105-a of the By-laws of the Board of Education and has been dismissed as a teacher pursuant to §105 of the By-laws of the Board of Education.

15. Deny the allegations set forth in paragraph "19" except admit that the unsatisfactory rating was reversed by the State Commissioner of Education on procedural grounds.

16. Deny the allegations set forth in paragraph "21" and respectfully refer the Court to the New York State Education Law §2590(j)7 and Board of Education By-law §105 for their full import.

17. Deny the allegations set forth in paragraphs "22" and "23".

18. Deny the allegations set forth in paragraph "24" except admit the first sentence of this paragraph and further admit that plaintiff Dobrowsky was rated "unsatisfactory" by his principal.

19. With respect to paragraph "25" defendants repeat and reallege with the same force and effect as if fully set forth herein defendants' answer to paragraph "17".

20. Deny the allegations set forth in paragraph "26" except admit that plaintiff was a licensed teacher who was rated unsatisfactory by her principal.

21. With respect to paragraph "27" defendants repeat and reallege with the same force and effect as if fully set forth herein, defendants' answer to paragraph "13".

22. Deny the allegations set forth in paragraph "28" and respectfully refer the Court to the complete text of the Board of Education By-law §105-a for its full import.

23. Deny the allegations set forth in paragraphs "29" and "30".

24. Deny the allegations set forth in paragraph "31" except admit that plaintiff Mills underwent a psychiatric examination and further deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third and last sentences of said paragraph.

25. Deny the allegations set forth in paragraph "32" except admit that plaintiff Mendoza had a temporary certificate of competency, and also admit that he passed an oral and written examination. Defendants further deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the fourth, sixth and seventh sentences of said paragraph.

26. Deny the allegations set forth in paragraph "33" and respectfully refer the Court to New York State Education Law §2568 for its full import.

27. Deny the allegations set forth in paragraphs "34", "35" and "36".

28. Deny the allegations set forth in paragraph "37" except admit the allegations set forth in the first and second sentences of said paragraph.

29. Deny the allegations set forth in paragraph "38" except admit that plaintiff Lubitch was neither legally entitled to a hearing nor legally entitled to present witnesses.

30. Deny the allegations set forth in paragraphs "39" and "40".

31. With respect to paragraph "41", defendants repeat and reallege with the same force and effect as if fully set forth herein defendants' answers to paragraphs "18" and "19".

32. Deny the allegations set forth in paragraph "42".

33. Deny the allegations set forth in paragraph "43" and respectfully refer the Court to Section 2590-j of the Education Law of the State of New York for its full text and legal effect thereof.

34. Deny the allegations set forth in paragraph "44" except admit that individuals who are transferred are not entitled to a hearing.

35. Deny the allegations set forth in paragraphs "45", "46", "47" and "48".

36. With respect to paragraph "49" defendants repeat and reallege with the same force and effect as if fully set forth herein defendants' answers to paragraphs "41" and "42".

37. Deny the allegations set forth in paragraphs "50" and "51".

38. Deny the allegations set forth in paragraph "52" except admit that there is no legal right to a hearing upon transfer.

39. Deny the allegations set forth in paragraphs "53" and "54".

40. With respect to paragraph "55", defendants repeat and reallege with the same force and effect as if fully set forth herein defendants' answers to paragraphs "8", "19" and "42".

41. Deny the allegations set forth in paragraph "56", except admit that the State Commissioner of Education reversed plaintiff Greenbaum's unsatisfactory rating on procedural grounds.

42. With respect to paragraph "57", defendants repeat and reallege with the same force and effect as if fully set forth herein defendants' answers to paragraphs "11", "14" and "26".

43. Deny the allegations set forth in paragraph "58" except admit that plaintiffs McAulay and Marland had

their unsatisfactory ratings reversed by the New York State Supreme Court on procedural grounds.

44. Deny the allegation set forth in paragraphs "59", "60", "61" and "62".

45. With respect to paragraph "63", defendants repeat and reallege with the same force and effect as if fully set forth herein defendants' answers to paragraphs "7", "8", "9", "10", "11", "13", "14", "17", "26" and "31".

46. Deny the allegations set forth in paragraphs "64", "65", "66" and "67".

47. With respect to paragraph "68", defendants repeat and reallege with the same force and effect as if fully set forth herein defendants' answers to paragraphs "1" through "14".

48. Deny the allegations set forth in paragraphs "69", "70", "71", "72" and "73".

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE:

49. This Court lacks subject matter jurisdiction over this action.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE:

50. The complaint fails to state a claim upon which this Court can grant relief.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE:

51. In all respects, defendants have acted properly, reasonably and in full accordance with applicable law.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE:

52. The parties herein have previously litigated the issues presented in the complaint and therefore the complaint is barred by the doctrines of res judicata and/or collateral estoppel.

AS AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE:

53. This action is barred by the Statute of Limitations.

AS AND FOR A SIXTH SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE:

54. Plaintiffs have failed to file a notice of claim as condition precedent to maintaining this action

AS AND FOR A SEVENTH SEPARATE AND COMPLETE DEFENSE AS TO PLAINTIFF TEACHERS UNITED FOR FAIR TREATMENT, DEFENDANTS RESPECTFULLY ALLEGE:

55. Teachers United for Fair Treatment lacks standing to maintain this action.

AS AND FOR AN EIGHTH SEPARATE AND COMPLETE DEFENSE AS TO PLAINTIFF MENDOZA, DEFENDANTS RESPECTFULLY ALLEGE:

56. There is presently pending an action in the United States District Court for the Eastern District of New York between plaintiff Mendoza and defendants regarding the issues presented by the complaint and therefore plaintiff Mendoza may not maintain this action.

AS AND FOR A NINTH SEPARATE AND COMPLETE DEFENSE AS TO PLAINTIFF McCRUM, DEFENDANTS RESPECTFULLY ALLEGE:

57. There is presently pending a proceeding in the Supreme Court of the State of New York, County of Kings, between plaintiff McCrum and defendants regarding the issues presented by the complaint and therefore plaintiff McCrum may not maintain this action.

AS AND FOR A TENTH SEPARATE AND COMPLETE DEFENSE AS TO PLAINTIFF FOGEL, DEFENDANTS RESPECTFULLY ALLEGE:

58. There is presently pending an appeal before the State Commissioner of Education between plaintiff Fogel



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and defendants regarding the issues presented by the complaint and therefore plaintiff Fogel may not maintain this action.

AS AND FOR AN ELEVENTH SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE:

59. The numerous, unrelated claims of the plaintiffs herein should be severed as said claims have no common question of law or fact.

WHEREFORE, defendants respectfully pray that this Court enter judgment dismissing the complaint with costs.

Dated: March 31, 1976

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007
566-2188/2741/2192

By: _____
HILLEN SHAPIRO
Assistant Corporation Counsel

_____
BARRY ASEN
Assistant Corporation Counsel

## DEFENDANTS' NOTICE OF MOTION TO DISMISS

**SAME CAPTION**

| | |
|---|---|
| Motion by: | Defendants |
| Date, Time and Place of Motion: | September 17, 1976 at 9:30 A.M. in the United States Court House, 225 Cadman Plaza East, Brooklyn, New York, in Courtroom 5 before the Honorable George C. Pratt, District Judge. |
| Relief Demanded: | An order pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing the complaint and for such other and further relief which this Court deems proper. |
| Supporting Papers: | Affidavits of Naomi de Sola Pool and Barry Asen |

Dated: July 28, 1976

Yours, etc.,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, N.Y. 10007
566-2188/2741

By: _____
BARRY ASEN
Assistant Corporation Counsel

By: _____
EILEEN SHAPIRO
Assistant Corporation Counsel

To: Clerk of the Court

Joan Goldberg, Esq.
Attorney for Plaintiffs

**AFFIDAVIT OF BARRY ASEN IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

**SAME CAPTION**

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

BARRY ASEN, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of W. BERNARD RICHLAND, Corporation Counsel of The City of New York, and as such, I am fully familiar with the above-entitled action.

2. This affidavit, the affidavit of Naomi de Sola Pool, the statements pursuant to Rule 9(g) and the accompanying memorandum of law are submitted in support of defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules for Civil Procedure.

3. As is apparent, this law suit was instituted by nine plaintiffs who do not share identical claims. Because of the unwieldy nature of this action, defendants have not moved on all grounds. For example, defendants have not sought to defend the constitutionality of certain by-laws

and statutes because the Court's decision on preliminary questions of law should preclude such challenges.

4. Defendants submit that upon the instant motion, this Court should grant summary judgment for defendants. However, if said motion is not granted in full, defendants respectfully request permission to move again at a later date for summary judgment upon other grounds.

WHEREFORE, it is respectfully requested that defendants' motion for summary judgment be granted and the complaint be dismissed.

BARRY ASEN

Sworn to before me this
28th day of July, 1976.

JEFFREY S. LADEN
Notary Public, State of New York
No. 03-4526537
Qualified in Bronx County
Commission Expires March 30, 1977

**AFFIDAVIT OF NAOMI DE SOLA POOL IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

**SAME CAPTION**

STATE OF NEW YORK )
: SS.:
COUNTY OF KINGS )

RUTH MARIA VEGA
Notary Public, State of New York
No. 24-4604426
Qualified in Kings County
Commission Expires March 30, 1977

NAOMI DE SOLA POOL, being duly sworn, deposes and says:

1. I am a medical doctor and the Assistant Director, Medical Bureau in the Board of Education, New York City. Since 1969 I have supervised the medical examination of candidates for license and teachers in service conducted in the Medical Bureau. Together with the Medical Director, I determine the dispositions of the candidates and teachers and the necessary recommendations. Prior to 1969 I was an examining physicain.

2. I submit this affidavit in support of defendants' motion for summary judgment as to plaintiffs LaFrances Hills and Maurice Mendoza.

3. It is a longstanding and rigidly enforced policy of the Board of Education to protect the confidentiality of medical files. The medical files are kept separate from personnel and payroll files.

4. The strict policy of the Board of Education is to prohibit the publication or release of the contents of medical files to principals, future employers, insurance companies or to anyone who is not duly authorized to receive this information. However, when a teacher applies for social security or veteran's benefits and authorizes release of information to these or other government agencies, we comply with the request. We do not release this information to commercial insurance companies or non-government bodies.

5. As provided by the collective bargaining agreement between the Board of Education and the United Federation of Teachers, the contents of the medical file are made available to a teacher's private physician when authorized by the teacher, the Chancellor or his confidential designee, but released to no other individual or department.

6. The only other time the contents of an individual's medical file are released is once that individual initiates a law suit against the Board of Education and the material therein is relevant to the issues being litigated. Thus the contents of the file are revealed as a result of the law suit.

7. The personnel files located in the schools do not contain any record of medical evaluations. If there is a psychiatric cause for suspension or discharge, the personnel file reflects only that there are medical reasons without specifying the nature of the disability.

Naomi de Sola Pool

NAOMI DE SOLA POOL, M.D.

Sworn to before me this
22nd day of July, 1976.

RUTH MARIA VEGA
Notary Public, State of New York
No. 24-4604426
Qualified in Kings County
Commission Expires March 30, 1977

Ruth Maria Vega

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF TEACHERS UNITED FOR FAIR TREATMENT**

**SAME CAPTION**

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF TEACHERS UNITED FOR FAIR TREATMENT

1. Defendants have no knowledge as to the composition of plaintiff Teachers United for Fair Treatment. However, for the purposes of this motion for summary judgment, defendants will accept certain allegations made in paragraphs "3" and "5" of the complaint, to wit:

> Plaintiff, Teachers United for Fair Treatment, is a non-profit organization whose membership consists of 125 teachers. Its members are prospective teachers, teachers on probation, tenured teachers and/or teachers who have been dismissed by defendant acting in their official capacity as officials of the Board of Education of the City of New York.

2. Plaintiff, Teachers United for Fair Treatment, represent teachers who are not similarly situated and who have various and distinct complaints against the Board of Education and defendants.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007

By: _____
BARRY ADAM, Asst. Corp. Counsel

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF KENNETH BOBROWSKY**

**SAME CAPTION**

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF KENNETH BOBROWSKY

1. On or about June 15, 1973, plaintiff Bobrowsky received an "Individual Rating Report" from his principal, Dr. Alexander Taffel, which rated his services for the year from September 1972 to June 1973 as "unsatisfactory". (See Exhibit "A").

2. Plaintiff instituted an Article 78 proceeding by order to show cause on December 4, 1973, in which he claimed that he was entitled to be represented by counsel at the 105a review. (See Exhibit "B").

3. On March 1, 1974, Justice John H. Monteleone dismissed plaintiff Bobrowsky's petition. (See Exhibit "C")

4. Subsequently pursuant to Section 105a of the By-laws of the Board of Education, plaintiff appealed the unsatisfactory rating.

5. On June 11, 1974, defendant Chancellor Anker, after reviewing the record, adopted the unanimous recommendation of the 105a Committee and sustained Mr. Bobrowsky's unsatisfactory rating. (See Exhibit "D").

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF KENNETH BOBROWSKY**

6. No charge of dishonesty or immorality has been made against plaintiff.

7. Plaintiff is still a tenured teacher at Bronx High School of Science. His services have not been interrupted because of the unsatisfactory rating.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007

By: _____
BARRY ASEN
Assistant Corporation Counsel

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF LA FRANCES HILLS**

**SAME CAPTION**

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF LA FRANCES HILLS

1. In 1972 plaintiff LaFrances Hills was a probationary teacher working at Public School 21, District 16, in Brooklyn, New York.

2. On May 30, 1972, pursuant to Section 2568 of the Education Law, plaintiff LaFrances Hills' principal requested that she be referred to the Medical Division (now known as the Medical Bureau) of the Board of Education for a medical examination. (See Exhibit "A")

3. On June 9, 1972, plaintiff was examined by two staff physicians of the Board of Education who referred plaintiff to a psychiatrist for a panel psychiatric evaluation. (See Exhibit "B").

4. On August 9, 1972, plaintiff was seen by a panel psychiatrist, Dr. Abbott Lippman.

5. On September 5, 1972 on the basis of the psychiatric evaluations, plaintiff was found unfit for duty and placed on involuntary medical. (See Exhibit "B").

## DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF LA FRANCES HILLS

6. On September 29, 1972 Ms. LaFrances Hills requested an evaluation by an ad hoc committee of physicians. The State Educational Law as well as the Collective Bargaining Agreement provides for an evaluation by an ad hoc committee. The new collective bargaining agreement between the Board of Education and the United Federation of Teachers provides for greater rights for a teacher by allowing the teacher to request an independent evaluation by a medical arbitrator whose decision is final and binding. (See Exhibit "C").

7. On October 3, 1972, Frederick Williams, Director of the Office of Personnel of the Board of Education, requested that Ms. Hills submit the name of her physician for the ad hoc committee. (See Exhibit "D").

8. On October 18, 1972, Mr. Williams reiterated to Ms. Hills his request. (See Exhibit "E").

9. On October 24, 1972 plaintiff's attorney provided Mr. Williams with plaintiff's physician's name. (See Exhibit "F").

10. Also on October 24, 1972, Ms. Hills informed Mr. Williams that her "medical condition does not permit [her] to appear before the Ad Hoc Committee at this time." (See Exhibit "G").

11. By letter dated November 16, 1974, plaintiff was given until November 24, 1974 to request another ad hoc committee review. (See Exhibit "H").

12. Ms. Hills did not request another ad hoc review.

13. On or about May 1, 1973 plaintiff appeared at the Medical Bureau to be adjudged fit to teach. On May 9, 1973 she was examined by a physician of the Medical Bureau.

14. Plaintiff's physician sent a letter to the Medical Bureau dated May 12, 1973. (See Exhibit "I").

15. Plaintiff then failed to keep three appointments made for her to be examined by a panel psychiatrist. (See Exhibit "J"). Her health leave was continued. (See Exhibit "J").

16. In February, 1974 plaintiff was examined in the Medical Division (now Bureau) and her leave was extended until June 30, 1974. (See Exhibit "K").

17. On April 26, 1974 plaintiff instituted an Article 78 proceeding in the Supreme Court of the State of New York, County of Kings against the Board of Education premised on the same allegations as those in the instant action. (See Exhibit "L").

18. The Article 78 proceeding was discontinued without prejudice by stipulation. (See Exhibit "M").

19. On October 9, 1974 plaintiff was again examined and it was concluded that she was still not fit to teach in

the Medical Bureau. (See Exhibit "N"). Plaintiff never requested further examinations after this date.

20. Plaintiffs' medical records are strictly confidential. There is no public access to the medical record See affidavit of Dr. Naomi De Sola Pool.

W. BERNARD RICHLAND
Corporation Counsel
Municipal Building
New York, N.Y. 10007

By: _____
BARRY ASEN,
Asst. Corporation Counsel

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF PAMELA MARLAND**

**SAME CAPTION**

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF PAMELA MARLAND

1. In June, 1973, plaintiff's services for the year 1972-1973 were rated unsatisfactory.

2. Plaintiff's appeal pursuant to Section 105a of the By-Laws resulted in the unsatisfactory rating being upheld.

3. Plaintiff then initiated an Article 78 proceeding in the Supreme Court of the State of New York, County of Kings. (See Exhibit "A").

4. On June 20, 1975, Justice Harry B. Frank granted the petition on procedural grounds. (See Exhibit "B").

5. Plaintiff Marland has not been charged with immorality or dishonesty.

6. Plaintiff is presently serving as a tenured teacher at Seward Park High School.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007

By: _____
BARRY ASEN
Assistant Corporation Counsel

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF MARY McAULAY**

**SAME CAPTION**

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF MARY McAULAY

1. Plaintiff was ordered to transfer from Seward Park High School to Washington Irving High School in 1971 but said transfer never occurred.

2. On June 11, 1973, plaintiff applied for a voluntary transfer from Seward Park High School to John F. Kennedy High School. (See Exhibit "A").

3. Plaintiff McAulay has not been charged with dishonesty or immorality.

4. Plaintiff is presently serving as a tenured teacher at John F. Kennedy High School.

W. BERNARD RICHLAND
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Attorney for Defendants
Municipal Building
New York, New York 10007.

By: _____
BARRY ASS'N
Assistant Corporation Counsel

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF MAURICE MENDOZA

1. In April 1971, plaintiff was allowed to serve as bilingual professional assistant pending the results of a physicial and medical examination.

2. On September 5, 1972, the Committee on Medical Examinations agreed with the recommendation of the Medical Division that plaintiff be considered "NOT FIT". (See Exhibit "A").

3. A letter dated December 15, 1972, notified plaintiff that he was denied a Certificate of Competency for medical reasons. (See Exhibit "B").

4. There was a "no probable cause" finding in response to plaintiff's complaint with the New York State Division of Human Rights. (See Exhibit "C").

5. There was a no "reasonable cause to believe that the charge is true" finding in response to plaintiff's complaint with the Equal Employment Opportunity Commission. (See Exhibit "D").

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF MAURICE MENDOZA**

**SAME CAPTION**

6. There was a "no probable cause" finding as to a complaint filed on April 19, 1974 with the City Commission on Human Rights as well as to a complaint filed on January 26, 1976 and reviewed February 25, 1976. (See Exhibits "E" and "F").

7. On November 12, 1975, plaintiff instituted an action in the United States District Court for the Eastern District of New York. (See Exhibit "G"). This action is still pending.

8. Plaintiff was obligated to take a medical examination as part of the licensing requirement. (See Exhibit "H").

9. Plaintiff's medical records are strictly confidential. There is no public access to these records. See affidavit of Dr. Naomi de Sola Pool.

10. Plaintiff has never been tenured.

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By: Barry Asen
BARRY ASEN
Assistant Corporation Counsel

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF HARRIET GREENBAUM**

**SAME CAPTION**

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF HARRIET GREENBAUM

1. Plaintiff is a tenured teacher of library who formerly taught at Erasmus High School, Brooklyn, New York.

2. In 1973 plaintiff was rated unsatisfactory for the school year by her principal Harriet Oxman. Plaintiff's supervisor, Rita Rush, also recommended that plaintiff be rated unsatisfactory.

3. Plaintiff's unsatisfactory rating was subsequently reversed by the State Commissioner of Education on the procedural ground that the assistant superintendent did not observe a class taught by plaintiff prior to said rating.

4. In accordance with §105 of the By-Laws of the Board of Education and §2573(6) and (7) of the Education Law, plaintiff, on April 23, 1974, was suspended with pay on the basis of charges preferred against her. (See Exhibit "A").

5. The City Board of Education approved said action on May 1, 1974.

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF HARRIET GREENBAUM**

6. Subsequently, specifications were served upon plaintiff (See Exhibit "B") which were later amended (See Exhibit "C").

7. Plaintiff was duly notified of the date of the scheduled hearing (See Exhibit "D").

8. Plaintiff was previously given copies of observation reports of her classroom performance by her superiors (See Exhibit "E").

9. Plaintiff's Section 105 hearing is still in progress.

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New York, New York 10007

By: Barry Asen
BARRY ASEN
Assistant Corporation Counsel

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF ALICE LUBITCH**

**SAME CAPTION**

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF ALICE LUBITCH

1. On or about April 15 or 16, 1974, Alice Lubitch, a plaintiff in this action, commenced a proceeding under Article 78 of the New York Civil Practice Law and Rules. A copy of the petition in said proceeding is annexed hereto as defendants' Exhibit "A".

2. The proceeding was litigated under Kings County Index No. 5844/74.

3. In connection with said proceeding, and in support thereof, Alice Lubitch submitted an affidavit sworn to the 14th day of June, 1974. A copy of said affidavit is annexed hereto as Exhibit "B".

4. In further support of said proceeding, there was submitted a "Reply Affidavit" by plaintiff's attorney, both in that proceeding and in this litigation. A copy of the affidavit of Joan Goldberg is annexed hereto as Exhibit "C".

5. In further support of said proceeding, plaintiff submitted a "Memorandum of Law" dated August 27, 1974 and a "Supplemental Brief" undated. A copy of the Memorandum of Law is annexed hereto as Exhibit "D" and a copy of the Supplemental Brief is annexed hereto as Exhibit "E".

6. On October 25, 1974 Justice Schwartzwald rendered a memorandum decision dismissing the petition "in all respects" and directing that a judgment be settled to that effect. A copy of said decision is annexed hereto as Exhibit "F".

7. On November 21, 1974 Justice Schwartzwald granted respondents, in said proceeding, judgment dismissing the proceeding "on the merits". The judgment was entered on that date. A copy of the judgment is annexed hereto as Exhibit "G".

8. On or about January 2, 1975 plaintiff served a notice of appeal from said judgment and on or about February 7, 1974 plaintiff filed a pre-argument statement in connection with said appeal. A copy of the notice of appeal is annexed hereto as Exhibit "H" and a copy of the pre-argument statement is annexed hereto as Exhibit "I".

9. On or about April 22, 1975, Alice Lubitch, a plaintiff in this action, commenced a second proceeding under Article 78 of the New York Civil Practice Law and

Rules. A copy of the petition in said proceeding is annexed hereto as defendants' Exhibit "J".

10. The proceeding was litigated under Kings County Index No. 9164/75.

11. On August 6, 1975, Justice Heller rendered a memorandum decision dismissing the petition, and directing that a judgment be settled to that effect. A copy of said decision is annexed hereto as Exhibit "K".

12. On August 22, 1975, Justice Heller [illegible] respondents judgment in said proceeding dismissing the proceeding "on the merits". The judgment was entered on that date. A copy of the judgment is annexed hereto as Exhibit "L".

13. On or about September 18, 1975, plaintiff served a notice of appeal from said judgment. A copy of the notice of appeal is annexed hereto as Exhibit "M".

14. On December 17, 1974, plaintiff and others commenced a law suit similar to the one herein in this Court. The complaint is annexed to the statement pursuant to Rule 9(g) as to Blossom Fogel, as Exhibit "N". An affidavit submitted by plaintiff Lubitch in support of that 1974 action is annexed hereto as Exhibit "N".

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF ALICE LUBITCH**

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007

By: _____
BARRY ASEN
Assistant Corporation Counsel

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF JOSEPH McCRUM**

**SAME CAPTION**

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS PURSUANT TO LOCAL RULE 9(g) IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF JOSEPH McCRUM

1. On February 8, 1974, plaintiff, a tenured teacher of biology and general science serving since 1970 at Lafayette High School, was charged with incompetent and inefficient service by defendant Chancellor Irving Anker and suspended with pay. (See Exhibit "A").

2. Said charges were received by the Board of Education and adopted by resolution on February 20, 1974. (See Exhibit "B").

3. In April 1974, plaintiff was notified that a hearing on said charges was scheduled for June 3, 1974. (See Exhibit "C").

4. Additionally plaintiff was sent a copy of the specifications of the charges against him. (See Exhibit "D").

5. Pursuant to State Education Law, §2573-7 and §105 of the By-Laws of the Board of Education, a hearing on said charges and specifications was conducted in June and July 1974 before the Honorable Francis E. Rivers sitting as trial examiner.

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF JOSEPH McCRUM**

6. Pursuant to State Education Law and §105, plaintiff was allowed to be represented by counsel, allowed to present witnesses and cross-examine witnesses, and allowed to submit all relevant and material evidence in his defense.

7. At the hearing, three of plaintiff's supervisors testified against him and criticized his teaching ability at great length. Numerous observation reports by said superiors were entered into evidence at the hearing. (See Exhibit "E"). Plaintiff had previously received copies of these observation reports.

8. On November 13, 1974, Judge Rivers determined that there was a preponderence of evidence to sustain the charges alleged in specifications 2, 3, 4 and 5. (See Ex. "F

9. Judge Rivers recommended that the charge of "incompetent and inefficient service" against plaintiff be sustained and that plaintiff be removed as a teacher in the employ of the Board of Education. (See Exhibit "F").

10. On January 22, 1975, the Board of Education by resolution adopted the recommendation of Judge Rivers and ordered plaintiff be discharged. (See Exhibit "G").

11. On April 3, 1975, the New York State Appellate Division determined that a tenured teacher, upon request, should be given a copy of the trial examiner's report prior to the decision of the Board of Education so as to have an

opportunity to controvert the trial examiner's findings. (See Exhibit "H").

12. In view of the decision by the Appellate Division, the Board of Education consented to annul its determination before Judge Rubin in Supreme Court, Kings County, and allowed plaintiff and his attorney an opportunity to respond to the findings and recommendation of Judge Rivers, the trial examiner.

13. After plaintiff responded to the finding and recommendation of Judge Rivers (See Exhibit "I"), the Board of Education, after reviewing all the evidence including plaintiff's response, adopted the recommendation of Judge Rivers and ordered plaintiff dismissed from service by resolution dated March 24, 1976. (See Exhibit "J").

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Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007

By: _____
BARRY ASEN,
Assistant Corporation Counsel

## DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF BLOSSOM FOGEL

**SAME CAPTION**

1. At the end of the 1970-1971 school year, plaintiff Blossom Fogel was given an unsatisfactory rating by Jacob Spinner, principal of William Maxwell Vocational High School.

2. In the Fall of 1971, plaintiff was transferred to Alexander Hamilton High School.

3. Plaintiff was rated unsatisfactory for the 1971-1972 school year by the principal, Jacob Spinner.

4. In May, 1972, Mr. Spinner recommended that she be suspended and brought up on charges of conduct unbecoming a teacher.

5. On or about October 11, 1972 Chancellor of the Board of Education, Harvey Scribner, preferred charges against the plaintiff. The charges consisting of conduct unbecoming her position and conduct prejudicial to the good order, efficiency, and discipline of the service. (See Exhibit "A" annexed hereto).

6. After a lengthy hearing held pursuant to Board of Education By-Law §105, the trial examiner dismissed certain charges against petitioner, found her guilty of other charges, and recommended dismissal from the service.

7. On June 28, 1973, the Board of Education concurred with the findings of the trial examiner, but modified

the penalty to the extent of giving the petitioner the optic of resigning as of July 15, 1973 so as to avail herself of any vested pension rights that may have accrued to her credit. Plaintiff did not resign.

8. On November 12, 1973, plaintiff commenced a proceeding in New York State Supreme Court against the Board of Education pursuant to CPLR Article 78. A copy of the petition in said proceeding is annexed hereto as defendants' Exhibit "B".

9. In support of said proceeding, plaintiff submitted an undated memorandum of law, which is annexed hereto as defendants' Exhibit "C".

10. Because the plaintiff raised the question of substantial evidence, the case was referred to the Appellate Division. The note of issue submitted by plaintiff is annexed hereto as Exhibit "D". Plaintiff submitted two additional memorandums of law to the Appellate Division. They are annexed hereto as defendants' Exhibits "E" and "F".

11. On June 20, 1975, the Appellate Division rendered an opinion remanding the matter to the respondent in order to afford the plaintiff an opportunity to examine the findings contained in the trial examiner's report. The Court also stated that it had considered the other contentions



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raised by plaintiff and found them to be "without merit". The decision of the Appellate Division is annexed hereto as defendants' Exhibit "G".

12. Pursuant to the decision of the Appellate Division, the Board of Education made the trial examiner's report available to the plaintiff, who then submitted a written response. In addition, on January 21, 1976, the plaintiff and her attorney addressed the Board of Education.

13. On January 21, 1976, the Board of Education adopted a resolution reaffirming its earlier disposition of the charges against the petitioner. The resolution and the separate opinion of the Board of Education are annexed hereto as defendants' Exhibits "H" and "I".

14. On November 13, 1975, plaintiff moved by Order to Show Cause in Supreme Court, Kings County, for an injunction prohibiting the Board of Education from taking further action against the plaintiff for back pay and attorneys' fees. The affidavit submitted by plaintiff in support of that motion is annexed as defendants' Exhibit "J".

15. On December 3, 1975, the Court dismissed the plaintiff's motion. The decision of the Court is annexed hereto as defendants' Exhibit "K". On December 18, 1975, plaintiff moved to reargue.Plaintiff's Notice of Motion and supporting Affidavit is annexed hereto as Exhibit "L". On

**DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) AS TO CLAIMS OF PLAINTIFF BLOSSOM FOGEL**

December 24, 1975, the Court granted plaintiff's motion to reargue, and adhered to its decision of December 3, 1973. The order of Judge Jacob Schwartzwald, granted January 28, 1976, is annexed hereto as defendants' Exhibit "M".

16. On December 17, 1974, plaintiff and others commenced a law suit in this Court. The complaint is annexed hereto as Exhibit "N".

17. On November 21, 1975, Judge Bruchhausen granted defendants' motion to dismiss the complaint on jurisdictional grounds. His decision is annexed hereto as defendants' Exhibit "O".

proceeding before the New York State Commissioner of Education. The notice of petition and petition are annexed hereto as defendants' Exhibit "P".

19. This proceeding is now pending before the Commissioner. Argument is tentatively scheduled for August 31, 1976.

W. BERNARD RICHLAND
Corporation Counsel
Municipal Building
New York, New York 10007

By: _____
BARRY ASEN
Assistant Corporation Counsel

## ATTORNEY'S AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

SAME CAPTION

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

JOAN GOLDBERG, being duly sworn, deposes and says:

1. I am the attorney for the plaintiffs in the above entitled action and in addition represented plaintiffs Blossom Fogel and Alice Lubitch in the various administrative proceedings and state court actions set forth in defendants' affidavit in support of their motion to dismiss.

2. The instant action is fora declaratory judgment declaring specified sections of the New York State Education Law unconstitutional and enjoining further action by defendants under those sections and mandating the return to work of those plaintiffs improperly dismissed thereunder, expunging all derogatory records and providing for constitutional safeguards prior to the request for psychiatric and physical examinations, as well as for damages for the individual plaintiffs for violation of their civil rights as provided in Section 1983.

3. These rights are clearly additional to and supplementary to any proceedings heretofore boughtin any state administrative agency or court.

4. The facts of each individual plaintiff's claims against the defendants are set forth at length in thecomplaint to

indicate that they have been damaged and that there is a controversy between the parties, requiring the court to hear this action.

5. The complaint indicates the nature of the unconstitutionality of the statute and regulations as applied to plaintiffs and need not be repeated herein.

6. Nor does the fact that the psychiatric and medical records of a teacher are kept confidential preclude a stigma to the teacher.

The teacher who is discharged on psychiatric grounds cannot claim that he or she resigned, because a future employer may request a recommendation or reference from the Board of Education. As Ms. Pool stated in her affidavit, at page 2, such medical files are released to persons "duly authorized to receive this information".

Included are government bodies, and thus a psychiatric evaluation would prevent a teacher from working for the state or federal grovernment. This is a stigma, requiring a hearing under Board of Regents v. Roth, 408 U.S. 564. See Velger v. Cawley; F.2d (2nd Cir. 1975).

7. Since there are facts in dispute in this case, summary judgment should not be granted.

8. Nor should defendants be given the opportunity to move again forsummary judgment.

## ATTORNEY'S AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

9. The plaintiffs should be permitted to proceed with discovery and this matter be brought to trial where issues of fact can be determined.

WHEREFORE, it is respectfully requested that defendants' motion for summary judgment be denied.

JOAN GOLDBERG

Sworn to before me this
21st day of October, 1976.

MARLENE CONNOR, Notary Public
State of New York, No. 03-5789465
Qualified in Bronx County
Commission Expires March 30, 19 78

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THEY CLAIM THERE EXISTS A GENUINE ISSUE TO BE TRIED.**

**SAME CAPTION**

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THEY CLAIM THERE EXISTS A GENUINE ISSUE TO BE TRIED.

1. Plaintiff Bobrowsky's reputation and standing in the community was stigmatized by the action of the defendants.

2. The unsatisfactory rating as a matter of law was arbitrary and capricious because it was based on the use of the word "masturbate" in a high school biology class.

3. Use of such word was protected conduct under the First Amendment to the Constitution.

4. Plaintiff Fogel was brought up on charges while three grievances were pending to determine whether letters written by the principal which formed the basis of the charge were unfair and untrue.

5. Dismissal was ordered by the Board of Education without giving plaintiff Fogel the opportunity to reply to the Trial Examiner's report. The Appellate Division remanded and ordered that she be permitted to respond.

6. There was no decision on the constitutional issues raised herein.

7. Plaintiff Greenbaum has been transferred from her job as librarian at Erasmus High School without a hearing in 1974. Dismissal charges are still pending. More than 2-1/2 years have

lapsed and plaintiff Greenbaum has been "stigmatized" and deprived of her position.

8. Plaintiff Hills has been "suspended" without pay as a result of a psychiatric examination. There is no other action pending on her behalf except the present action. Her Article 78 proceeding was withdrawn by consent.

9. Plaintiff Lubitch brought two separate Article 78 proceedings in the state court. In November, 1974 she sustained an injury after being hit in the head with a volley ball. She was examined by the Board of Education and held to be physically fit and able to return to work. She was declared to be fit to return to work without a hearing of any sort, although her physician stated she was physically unable to work.

10. She brought the first proceeding and the court held thatit would not look behind the Board's decision and that no hearing was required. Subsequently, plaintiff Lubitch attempted to return to work, but was asked not to return because she could not work the entire day becauseof fatigue and other problems. The second Article 78 proceeding was brought and the court again heldthat the court was bound by thefindings of the Board of Education and upheld the finding she was not fit and dismissed the petition. Since that time Ms. Lubitch has been re-examined and has been found fit for duty. She is nevertheless not working.

She is unable to work. The state court in an Article 78 proceeding is bound by the finding of the Board of Education and unless it is held to be arbitrary the court will not look to the other actions of the Board, but merely to the single proceeding before it. Obviously, any court that will uphold the findings of the Board without a hearing will not grant necessary relief. Ms. Lubitch has sued herein to enjoin the medical board from rejecting physician's letters and diagnosis without reason.

11. Plaintiff Mary McAulay is a teacher who has been rated unsatisfactory three different occasions. She has brought no proceeding to overturn these ratings. Defendants' statement of undisputed facts does not deal with the question involved in any way. Mary McAulay has a cause of action under 1983 since there is no question of res judicata or collateral estoppel in this case.

12. Plaintiff McCrum has no Article 78 proceeding pending. Plaintiff McCrum was brought up on charges leading to his dismissal. In the Article 78 proceeding that he brought, the court reversed on the basis of its decision in Fogel, holding that the Board of Education must furnish a copy of the Trial Examiner's recommendationsto the teacher. The matter was then remanded to the Board of Education. It is interesting to note

that the decision in McCrum clearly states that all matters of constitutional claims are held in abeyance. There was no determinationof the constitutional claims of this plaintiff.

13. Plaintiff Mendoza was denied a license after passing a licensing examination as bi-lingual teacher. At the time he had a certificate of competency. Teachers are not given a psychiatric examination as part of the licensing examination. The fact that this case is in litigation does not bar this plaintiff from being one of a number of plaintiffs who are seeking to declare unconstitutional the various regulations and statutes pertaining to the Board of Education which permit arbitrary and unreasonable dismissals, and failure to hire a person in violation of teachers' rights under the Constitution.

14. Plaintiff Pamela Marland is a teacher who won her case in the state court. She brought an Article 78 proceeding to determine whether or not the Board of Education had acted contrary to its By-Laws, rules and regulations and the Education Law of the State of New York. A court found that it had done so. The relief requested and granted was to expunge her U rating and such was probably done.

However, this action is entirely different. This suit is against the defendants for violation of plaintiff's constitutional rights. The relief requested is damages to compen-

sate plaintiff for the resulting injury she suffered. This action is based on claims not previously raised by the plaintiff; not previously determined by the court in the Article 78 proceeding.

15. Plaintiff Teachers United For Fair Treatment is an organization of teachers who have been disciplined by the Board of Education. They are similarly situated in that they have a single interest - to prevent continued harassment of outspoken, political teachers who support teachers' rights in the schools.

Dated: October 21, 1976.

JOAN GOLDBERG
Attorney for Plaintiffs
275 Madison Avenue
New York, N.Y. 10016

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

**COURT OF APPEALS**
**SECOND CIRCUIT**

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**TEACHERS UNITED FOR FAIR TREATMENT, KENNETH BOBROWSKY, BLOSSOM FOGEL, HARRIET GREENBAUM laFRANCES HILLS, ALICE LUBITCH,**
**Appellants.**
*- against -*
**IRVING ANKER Chancellor of the Board of Education of the City of New York, ISAIAH ROBINSON, President of the Bd of Ed. of the city of New York,**
**Appellees.**

*Index No.*

*Affidavit of Personal Service*

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*STATE OF NEW YORK, COUNTY OF* *ss.:*

*I,* James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

*That on the* 6th *day of* Sept *19*77 *at* Municipal Building New York, New York

*deponent served the annexed* ~~Record~~ Appendix *upon* W. Bernard Richland Corp Counsel

*the* *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

*Sworn to before me, this* 6th *day of* Sept. *19* 77

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

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